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Judge Field

Field

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# TRANSCRIPT OF RECORD.

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## SUPREME COURT OF THE UNITED STATES.

No. ~~329~~ 102

GEORGE FOLLANSBEE, APPELLANT,

vs.

THE BALLARD PAVING COMPANY, COMPOSED OF W. H. BALLARD, T. E. BROWN, AND E. L. MARSH.

**FILED JANUARY 29, 1877.**

No. ~~715.~~ 441

THE BALLARD PAVING COMPANY ET AL., APPELLANTS,

vs.

JOHN C. MULFORD ET AL.

**FILED JULY 6, 1876.**

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

# SUPREME COURT OF THE UNITED STATES.

## No. 329.

GEORGE FOLLANSBEE, APPELLANT,

VS.

THE BALLARD PAVING COMPANY, COMPOSED OF W. H. BALLARD, T. E. BROWN, AND E. L. MARSH.

## No. 715.

THE BALLARD PAVING COMPANY ET AL., APPELLANTS,

VS.

JOHN C. MULFORD ET AL.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Original bill.—Filed Feb. 25, 1874.*

In the supreme court of the District of Columbia, February, 1874.

| | |
|---|---|
| WILLIAM W. BALLARD, TALLMAN E. BROWN, and Edward L. Marsh, partners trading under the firm name and style of The Ballard Pavement Company,<br>*v.*<br>MICHAEL MANDLE AND EDWARD P. AISTROP and Henry H. Dudley, partners trading under the firm name and style of Aistrop & Dudley; and Alexander R. Shepherd, James A. Magruder, Henry A. Willard, Adolph Cluss, and John B. Blake, comprising the board of public works of the District of Columbia. | No. 3606. Equity docket, 13. |

2 To the supreme court of the District of Columbia, holding an equity court for said district:

The plaintiffs complain as follows:

1. The plaintiff William W. Ballard is a resident of the city of Elmira, in the State of New York; the plaintiff Edward L. Marsh is a resident of the city and State of New York; and the plaintiff Tallmadge E. Brown is a resident of Des Moines, in the State of Iowa. The plaintiffs are partners doing business in the District of Columbia and elsewhere under the firm name and style of The Ballard Pavement Company. They bring this suit as such company and sue in their own right.

2. The defendant M. Mandle is a resident of the State of New York. His Christian name is unknown to the plaintiffs. He is sued in his own right. The defendants Edward P. Aistrop and H. H. Dud-
3 ley are residents of the District of Columbia, engaged in business as brokers under the firm name of Aistrop and Dudley, and are sued in their own right.

The defendants Alexander R. Shepherd, James A. Magruder, Henry A. Willard, Adolph Cluss, and John B. Blake constitute the board of public works of the District of Columbia, a municipal corporation organized under an act of the Congress of the United States, and are sued as such board.

3. The plaintiffs for a year past have been engaged in putting down pavements on the streets in the city of Washington in said District under contracts with said board of public works. In part payment therefor they have from time to time received certificates of the auditor of said board in the following form:

4 [No. .]

OFFICE OF AUDITOR
BOARD OF PUBLIC WORKS,
*Washington, D. C.,* .

I hereby certify that I have this day audited and allowed the account of for , amounting to .

*Auditor.*

They have also, from time to time, in the course of their business, received other similar certificates issued by said board to other persons for work done.

4. On or about the 17 day of January, 1874, the plaintiffs made and delivered to the defendant Mandel their promissory note in the sum of $\$4{,}181\frac{50}{100}$, payable three months after said date, either to the order of said Mandle or to blank, the plaintiffs cannot with certainty 5 state which. At the same time the plaintiffs delivered to said Mandle five certificates of the auditor of said board in the form above given, amounting at their par value to $\$10{,}453\frac{41}{100}$. It was distinctly understood and agreed by and between the plaintiffs and said Mandle at the time of the delivery to the latter of said certificates that they were delivered him to be held as collateral security for the payment of said note, and it was so stated in the body of said note, and as a part thereof. Said certificates are more particularly described by number, date, and amount in the paper hereto appended, marked Exhibit A, and made a part hereof. Said Mandle gave the plaintiffs a receipt for said certificates, copy of which receipt is hereto appended, marked Exhibit B, and made part hereof.

6 5. On or about the 26th day of January, 1874, the plaintiffs made and delivered to the defendants Aistrop and Dudley a promissory note signed by the plaintiffs as The Ballard Pavement Company, dated Washington, D. C., January 26th, 1874, in the sum of $\$6{,}428\frac{28}{100}$, payable four months after date, either to the order of said Aistrop & Dudley or to blank, but which the plaintiffs cannot with certainty aver. At the same time the plaintiffs delivered to said Aistrop & Dudley five certificates of the auditor of said board in the form above given, amounting at their par value to $\$16{,}070\frac{76}{100}$. It was distinctly understood and agreed by and between the plaintiffs and said Aistrop & Dudley at the time of the delivery to the latter of said certificates that they 7 were delivered to them to be held as collateral security for the payment of said note, and it was so stated in the body of said note, and as a part thereof. Said certificates are more particularly described by number, date, and amount in the paper hereto appended, marked Exhibit C, and made part hereof. Said Aistrop & Dudley gave the plaintiffs a receipt for said certificates, a copy of which receipt is hereto appended, marked Exhibit D, and made part hereof. The plaintiffs have since been informed, and believe, and therefore aver that immediately after receiving said note and certificates said Aistrop & Dudley delivered both the note and the certificates to the defendant Mandle, and that they claim to have acted as his agents in the transaction.

8 6. All the certificates aforesaid when handed to the defendant Mandle and the defendants Aistrop & Dudley respectively were endorsed in blank by the persons or firms to whom the amounts therein expressed were respectively certified to be due.

7. Within a few days past the plaintiffs have learned that said certificates in the 4th and 5th paragraphs of this bill mentioned, or many of them, have been offered for sale and sold in said District to different persons. The plaintiffs are informed and believe that said Mandle, while retaining said notes, has, in violation of the agreements aforesaid, assumed to transfer said certificates, or most of them, to persons in said District and elsewhere, either without giving them notice of the 9 purpose for which alone be held said certificates, to wit, as collateral security as aforesaid, or in collusion with them to defraud the plaintiffs.

8. The plaintiffs charge that it is the intention of the holders of said

certificates to present them to said board and obtain payment thereof either in money or bonds, payable to bearer, without regard to the rights of the plaintiffs, and before the maturity of said notes, and that it is the intention of said Mandle to pass said notes to third persons, and thereby greatly to harass and defraud the plaintiffs; and that said board will pay said certificates upon presentation by the holders
thereof, or give in exchange for them bonds payable to bearer,
10 without regard to the rights of the plaintiffs, and to their great
and manifest injury, unless said board be restrained from so
doing by the interposition of this honorable court.

9. The plaintiffs are willing, and hereby offer, to pay into court on the days said notes respectively mature, or at any time thereafter, the respective amounts thereof, upon the defendants or any of them bringing into court the said notes and the certificates therein respectively mentioned.

10. The defendant Mandle is believed to be wholly insolvent and irresponsible.

11. The plaintiffs cannot state who are now the holders of said certificates, or any of them, but they are informed and believe that the
names of the present holders of said certificates, or of some of
11 them, are known to the defendant Mandle and to the defendants
Aistrop and Dudley.

12. To the end, therefore, that the said defendants Mandle, Aistrop, and Dudley may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, and perfect answer make to the following interrogatory:

To whom were the certificates of indebtedness hereinbefore described, or any of them, transferred by the defendant Mandle; through whose hands have they or any of them since passed, and who are the present holders of the same, or of any of them? Give the full name and address of the person, persons, firms, or banks now holding said certificates, or any of them.

12 *Prayer.*

The plaintiff therefore pray' as follows:

1. That the defendant Mandle may be enjoined by order of this court from transferring or negotiating said notes or either of them.

2. That the said Board of Public Works of said District may be enjoined from taking up, paying, or taking in exchange for bonds or other securities, said certificates of indebtedness or any or either of them, pending this suit.

3. That said Mandle may be required to bring said notes into court at maturity and that the holders of said certificates parties hereto, or who may hereafter be made parties hereto, may be required to bring
them into court on the maturity of said notes respectively.
13 4. That upon the delivery into court of said notes and certifi-
cates respectively, and the payment into court by the plaintiffs
of the amount of said notes, that the said notes and certificates may be delivered over to the plaintiffs, and the said several defendants decreed to interplead touching their several claims to said money so paid into court, and that such action may be taken thereon as may be just to all the persons in interest.

5. For such other and further relief as to the court may seem meet.

The defendants hereto are M. Mandle, Edward P. Aistrop, H. H.

Dudley, Alexander R. Shepherd, James A. Magruder, Henry A. Willard, Adolph Cluss, John B. Blake.

WM. W. BALLARD.
EDWARD L. MARSH.
TALLMADGE E. BROWN,
Per E. L. MARSH.

E. L. STANTON,
A. S. WORTHINGTON,
*Sol'c'rs for Compl't.*

14 I, on oath, say that I have read the foregoing bill by me subscribed; that wherein the same states facts as of my own knowledge it is true; and that wherein it purports to state facts upon information from others I believe it to be true.

WM. W. BALLARD.

Sworn and subscribed to before me this 20th day of February, 1874.
[SEAL.] HENRY R. ELLIOTT,
*U. S. Commissioner for the Dist. of Col.*

EXHIBIT A.

| | |
|---|---|
| No. 4780, Dec. 24, '73 | $2,329 14 |
| " 4319, " 5 | 1,020 30 |
| " 4706, " 20 | 500 00 |
| " 135, Jan'y 8, '74 | 5,000 00 |
| " 147, " 9 | 1,603 97 |
| | 10,453 41 |

15 EXHIBIT B.

JAN'Y 26, 1874.

Rec'd of Ballard Pavement Co., auditor's c'f's No. 455, $\$2{,}065\frac{92}{100}$; No. 457, $5,000; No. 461, $\$6{,}462\frac{80}{100}$; No. 468, $1,339.03, and No. 458, $\$1{,}202\frac{95}{100}$, amounting to sixteen thousand and seventy & $\frac{70}{100}$ dollars, as collateral security to a stock note for six thousand four hundred twenty-eight & $\frac{28}{100}$ dollars, at four months from this date.

(Signed) AISTROP & DUDLEY.

EXHIBIT C.

| | |
|---|---|
| No. 461, Jan'y 24, '74 | $6,462 80 |
| " 468, " | 1,339 03 |
| " 455, " | 2,065 92 |
| " 457, " | 5,000 00 |
| " 458, " | 1,202 95 |
| | 16,070 70 |

16 EXHIBIT D.

Received from the Ballard Paving Co. $\$10{,}453\frac{41}{100}$ (ten thousand four hundred and fifty-three $\frac{41}{100}$ dollars) in auditor's certificates of the District of Columbia as collateral to secure the payment of their note of $\$4{,}181\frac{50}{100}$, four thousand one hundred and eighty-one $\frac{50}{100}$ dollars, which is due three months from date or upon three days' notice.

Washington, January 17th, 1874.

(Signed) M. MANDLE.

17 *Subpœna.*

In the supreme court of the District of Columbia, February 25, 1874.

THE BALLARD PAVEMENT COMPANY, complainant, *against* M. MANDLE ET AL., DEFENDANTS. } No. 3606. Equity docket.

The President of the United States to M. Mandle, Edward P. Aistrop, Henry H. Dudley, and The Board of Public Works of the Dist. of Columbia, defendants:

You are hereby commanded to appear in this court, at its first special term occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
*Ass't Clerk.*

MEMORANDUM.—That the defendant to enter appearance in this in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

18 *Restraining order.*

An original bill praying that the defendants, The Board of Public Works, be enjoined from paying or taking up the certificates of indebtedness in the bill mentioned, and that the defendant Mandle be restrained from negotiating certain notes in the bill described, is this day filed. Hearing is fixed for the 6th day of March, 1874, at 11 o'clock a. m. Until further order you are hereby restrained as prayed.

By order of the court.

A. WYLIE,
*Justice, &c.*

*Marshal's return.*

Not to be found, M. Mandle. Sum'd the others & served notice for injunction.

A. SHARP, *Marshal.*

FEB'Y 26th, '74.

19 *Order for appearance of absent defendant.—Filed May 7, 1874.*

In the supreme court of the District of Columbia, the 6th day of May, 1874.

THE BALLARD PAVEMENT COMPANY *v.* MICHAEL MANDLE ET AL. } No. 3606. Eq. doc., 13.

On motion of the plaintiff by Messrs. Stanton & Worthington, its solicitors, it is ordered that the defendant Michael Mandle cause his appearance to be entered herein on or before the first rule-day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default.

By the court.

A. WYLIE,
*Justice, &c.*

*Proof of publication.—Filed July* 8, 1874.

OFFICE OF THE NATIONAL REPUBLICAN,
*Washington, June* 10, 1874.

I hereby certify that the advertisement of which the annexed 20 is a copy was published in the daily National Republican once a week for three successive weeks, commencing May 8, 1874.

W. J. MURTAGH,
*Proprietor Nat'l Republican.*

Sworn and subscribed before me this 10th day of June, 1874.

[SEAL.] JOS. T. K. PLANT, *J. P.*

*Advertisement.*

In the supreme court of the District of Columbia, the 7th day of May, 1874.

THE BALLARD PAVEMENT CO.
*vs.*
MICHAEL MANDLE ET AL.
} No. 3606. Equity docket.

On motion of the plaintiff, by Messrs. Stanton & Worthington, its solicitors, it is ordered that the defendant Michael Mandle cause his appearance to be entered herein on or before the first rule-day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default.

By the court.

A. WYLIE, *Justice, &c.*

True copy. Test:

R. J. MEIGS, *Clerk, &c.*

21 *Decree pro confesso against Mandle.—Filed July* 8, 1874.

In the supreme court of the District of Columbia.

THE BALLARD PAVEMENT CO.
*vs.*
MICHAEL MANDLE ET AL.
} No. 3606. Eq. doc., 13.

This cause coming on to be heard upon the motion of complainant's solicitor for a decree pro confesso against Michael Mandle, and it being shown to the court that the order heretofore passed in said cause for the appearance of said defendant has been published as required by law and due evidence of said publication having filed in this cause, and it further appearing that said defendant has not caused his appearance to be entered in said cause as required by said order, it is thereupon, this 8th day of July, 1874, ordered and decreed that the bill of com-
22 plaint in said cause be and is hereby taken for confessed against said defendant Michael Mandle.

By the court.

A. W.

*Order granting leave to file supplemental bill.—Filed Nov.* 11, 1874.

In the supreme court of the District of Columbia.

WM. W. BALLARD ET AL.
*vs.* No. 3606. Eq. doc., 13.
MICHAEL MANDLE ET AL

Upon motion of the solicitor for the complainants, leave is given the complainants to file their supplemental bill making John C. Mulford and others parties defendant in this suit.

By the court.

A. W.

23 *Supplemental bill.—Filed Nov.* 11, 1874.

In the supreme court of the District of Columbia.

WILLIAM W. BALLARD, TALLMADGE E. BROWN, and Edward L. Marsh, partners, trading under the firm name and style of The Ballard Pavement Company,

*vs.*

MICHAEL MANDLE, AND EDWARD P. AISTROP, and Henry H. Dudley, partners, trading under the name, firm, and style of Aistrop & Dudley, and the Board of Public Works of the District of Columbia, H. L. Horton, H. L. Horton & Company, the National Metropolitan Bank of the District of Columbia, John C. Mulford, T. W. Riley, Francis H. Morgan, J. F. Em-
24 mons, A. Soher, E. P. Goodwin, The First National Bank of New York, and the Middletown National Bank of Middletown, New York; and R. M. Tayler, J. M. Broadhead, board of audit; W. W. Corcoran, Henry M. Sweeney, Lewis J. Davis, and Moses Kelley, commissioners of the sinking fund of the District of Columbia.

Supplemental bill.

To the supreme court of the District of Columbia, holding an equity court for said District:

The plaintiffs complain as follows:

1. Since the filing of the original bill in this case, by an act of
25 Congress approved June 20th, 1874, the Board of Public Works of the District of Columbia has been abolished and a board of audit has been created whose duty it is by said act to receive all such certificates of the auditor of said board of public works, as those described in said original bill, and to issue to the owners thereof certificates of said board of audit in lieu thereof; and by the same act the commissioners of the sinking fund of the District of Columbia are authorized to exchange for such certificates of the board of audit certain bonds of the District of Columbia described in said act. Said board of audit

and said commissioners, ever since the approval of said act, have been engaged in carrying out its said provisions.

2 All of the certificates of said board of public works which are
26 referred to in said original bill, except that one numbered 457, have
been presented to said board of audit for their action, under said act of Congress, by various persons or corporations as follows: No. 4780, by John C. Mulford, of the city of Salem, in the State of New Jersey; No. 4319, by T. W. Riley, of the city of Washington, District of Columbia; No. 4706, by the National Metropolitan Bank of the District of Columbia, heretofore made party defendant to this suit by an amendment to the original bill; No. 135, by the First National Bank of New York, a body corporate under the laws of the United States, having its principal place of business in the city and State of New York; No. 147,
by Francis H. Morgan, of said city of Washington; No. 458,
27 by the Middletown National Bank, of the city of Middletown,
State of New York, a body corporate under the laws of the United States; No. 468, by E. P. Goodwin, of said city of Washington; and numbers 461 and 455, by J. F. Emmons and A. Soher, respectively, whose places of residences are to the complainants unknown.

3. From time to time after said board of audit was organized the complainants (having first filed with said board a copy of the original bill in this case) applied to said board for information as to the names of the persons presenting the certificates in said bill described, for the purpose of making them parties defendant thereto, and were on every such occasion (except the last) informed that they would be furnished
28 with a list of such persons in a short time, and that in the mean
time no action would be taken concerning said certificates, but that they would be held to await the decision of this honorable court as to the ownership of the same.

4. The complainants last applied for such information on the 10th day of November, 1874, and were then given by said board of audit the information set forth in the 2d paragraph of this supplemental bill; and on the same day they were further informed by said board of audit that they, said board, had issued to certain of the persons in said paragraph mentioned certificates of said board of audit in lieu of the certificates of the auditor of the board of public works which said persons had
29 respectively presented, and that they, said board of audit, are
about to issue their said certificates to the other persons named in said paragraph. The certificates of the auditor of the board of public works described in the original bill, for which said board of audit have so issued their own certificates, are the following: Number 147, for which said Francis H. Morgan has received certificates number 7088 to 7095, inclusive, of said board of audit; number 461, for which said J. F. Emmons has received certificates number 7051 and 7336 of said board of audit; number 468, for which said E. P. Goodwin has received certificates No. 7050 and 7337 of said board of audit; and number 455,
30 for which A. Sober has received certificates No. 7082 and 7335 of
said board of audit.

5. The complainants, on information and belief, aver that said Morgan, Emmons, Goodwin and Soher are about to present said certificates of said board of audit, all of which rightfully belong to the complainants, to said sinking fund commissioners, and to receive from said commissioners bonds of the kind aforesaid payable to bearer; and they further aver, on information and belief, that the other persons in said 2d paragraph mentioned are about to receive from said board of audit, in lieu of the certificates of the auditor of the Board of Public Works, by

them respectively presented, the certificates of said board of audit, and to exchange such last-mentioned certificates for bonds,
31 payable to bearer as aforesaid.

6. Said board of audit is composed of R. W. Tayler and J. M. Brodhead, and said sinking fund commissioners are Lewis J. Davis, Moses P. Kelley, W. W. Corcoran, and Henry M. Sweeney.

*Prayers.*

The plaintiff, therefore, prays as follows:

1. That the said John C. Mulford and T. W. Riley, and the said National Metropolitan Bank, the said First National Bank of New York, and the said Middletown National Bank, their attorneys and agents, may be enjoined pending this suit from receiving from said board of audit the certificates of said board in lieu of, or in settlement of, any or either of said certificates of the auditor of the board of public works, numbered respectively 4780, 4319, 4706, 135, 457 and 458, and from
32 selling, assigning, or in any way transferring their pretended title to said certificates.

2. That the said Francis H. Morgan, J. F. Emmons, E. P. Goodwin, and A. Soher, their attorneys and agents, may be enjoined pending this suit from presenting to said commissioners of the sinking fund any or either of the certificates of the said board of audit numbered 7051, 7336, 7050, 7337, 7088 to 7095 inclusive, 7082 and 7335, received by them as aforesaid, and from receiving from said commissioners bonds in exchange therefor, and from selling, assigning, hypothecating, or in any way transferring said certificates of said board of audit, or their pretended title to such certificates.

3. That if the said Mulford and others, mentioned in the 2nd
33 paragraph of this supplemental bill, or any of them, shall have received certificates of said board of audit in lieu of the certificates of said auditor of the Board of Public Works, in the original bill described, and shall have sold such certificates of the board of audit, or exchanged them for bonds under said act of Congress, that they may be required to deliver up to the complainants such bonds so received on the proceeds of such bonds or certificates, or the equivalent thereof in money.

4. That, pending this suit and perpetually thereafter, said R. W. Tayler and J. M. Brodhead may be enjoined from issuing certificates of said board of audit in lieu of or in exchange for certificates of the
34 auditor of the Board of Public Works, numbered respectively 4780, 4319, 4706, 135, 457 and 458, or in lieu of or in exchange for any or either of them.

5. That, pending this suit and perpetually thereafter, said Moses P. Kelley, W. W. Corcoran, Henry M. Sweeney, and Lewis J. Davis may be enjoined from issuing bonds of the District of Columbia, in lieu of or in exchange for certificates numbered 7051, 7336, 7050, 7337, 7088 to 7095 inclusive, 7082 and 7335 of said board of audit.

6. That the complainants may have such other and further relief as the nature of the case may require.

7. That the writ of subpœna may issue, commanding, &c, to appear and answer this supplemental bill and the original bill in this case.

35 The persons who are made defendants in this supplemental bill in addition to those who are defendants to the original bill, as amended, are, John C. Mulford, T. W. Riley, Francis H. Morgan, J. F. Emmons, A. Soher, E. P. Goodwin, The First National Bank of New

York, The Middletown National Bank of Middletown, New York; R. W. Taylor, and J. M. Brodhead, board of audit; Moses P. Kelley, W. W. Corcoran, Henry M. Sweeney, Lewis J. Davis, commissioners of the sinking fund.

WILLIAM W. BALLARD.
T. E. BROWN.
E. L. MARSH,
By W. W. BALLARD.

36 I, William W. Ballard, on oath say that I have read the foregoing bill by me subscribed, and I know the contents thereof; that the facts therein stated from my personal knowledge are true; that the facts stated therein upon information received, I believe to be true.

WM. W. BALLARD.

Sworn and subscribed to before me this eleventh day of November, A. D. 1874.

[SEAL.]

A. C. BRADLEY,
*U. S. Comm'r.*

37 *Subpœna to ans. supplemental bill, &c.*

In the supreme court of the District of Columbia, November 11th, 1874.

WILLIAM W. BALLARD ET AL., COMPLAINANT',
*against*
MICHAEL MANDLE ET AL., DEFENDANT.
} No. 3606. Equity doc. 13.

The President of the United States to John C. Mulford, Terence W. Riley, Francis H. Morgan, J. F. Emmons, A. Soher, E. P. Goodwin, The First National Bank of New York, The Middletown National Bank of New York, and R. W. Taylor and J. M. Brodhead, board of audit of the District of Columbia, Moses. P. Kelley, W. W. Corcoran, Henry M. Sweeney, and Lewis J. Davis, commissioners of the sinking fund of the District of Columbia, and The National Metropolitan Bank, defendants.

38 You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the supplemental and original bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS,
*Clerk, &c.,*
By L. P. WILLIAMS,
*Ass't Clerk.*

*Inj'c't'n.—Restraining order.*

A supplemental bill praying that John C. Mulford, Terence W. Riley, The National Metropolitan Bank, The First National Bank of New York, and The Middletown National Bank be enjoined from receiving certificates of the board of audit of the District of Columbia in settlement of certificates of the auditor of the board of public works Nos. 4780, 4319,

4706, 135, 457, and 458, and from transferring their right to the
39 same; that Francis H. Morgan, J. F. Emmons, E. P. Goodwin,
and A. Soher be enjoined from receiving from the com'rs of the sinking fund bonds in exchange for board of audit certificates Nos. 7051, 7336, 7050, 7337, 7088, 7095 inclusive, 7082 and 7335, and from transferring their right to the same; and that the commissioners of the sinking fund of the Dist. of Columbia may be enjoined from exchanging for said certificates, or any of them, bonds of the Dist. of Columbia, is this day filed. Hearing is fixed for the 8th day of December, 1874, at 11 o'clock a. m. Until further order you are hereby restrained as prayed.

By order of the court.

A. WYLIE,
*Justice, &c.*

Attest:

R. J. MEIGS,
*Clerk, &c.,*
By L. P. WILLIAMS,
*Ass't Clerk, &c.*

40 *Marshal's return.*

Sum'n'd and served notice for injunction on F. H. Morgan, R. W. Taylor, & J. M. Brodhead, board of audit D. C., Moses Kelly & Lewis J. Davis, comm'rs of sinking fund, and Chas. E. White, cashier of Nat. Met. Bank, Washington, D. C.

Not to be found the others.

Nov. 12, 1874.

Sum'n'd and served notice for injunction on John C. Mulford & Terence W. Riley.

ALEX. SHARP, *Marshal.*

Nov. 17th, '74.

41 *Preliminary injunction.—Filed Dec. 15, 1874.*

In the supreme court of the District of Columbia.

The Ballard Pavement Company
*v.* } No. 3606. Eq. doc., 13.
Michael Mandle and others.

This cause coming on to be heard upon the complainant's application for a preliminary injunction, after agreement thereon by the respective counsel for the plaintiffs and defendants, and after consideration thereof, it is this 15th day of December, 1874, ordered that the defendants, the commissioners of the sinking fund of the District of Columbia, be, and they hereby are, enjoined pending this suit, from issuing bonds of said
District in exchange for certificates of the board of audit of said
42 District numbered 7051, 7336, 7050, 7337, 7082, and 7335, or in
exchange for certificates of said board of audit issued upon certificates of the auditor of the Board of Public Works numbered 135, 457, 458, 4706, and 4780; and it is further ordered that the remaining defendants, and each of them (except the said board of audit), and their agents and assigns, be, and they hereby are, enjoined, pending this suit, from receiving from said board of audit the certificates of said board of audit in exchange for either or any of said certificates of the auditor of the Board of Public Works, and from receiving from said commissioners

of the sinking fund bonds in exchange for said certificates of the board of audit, or in exchange for certificates of the board of audit issued upon either or any of said certificates of the auditor of the Board of Public Works.

By the court.

A. W.

43 *Affidavit of A. S. Worthington.—Filed Dec. 28, 1874.*

In the supreme court of the District of Columbia.

WM. W. BALLARD ET AL.
*vs.*
MICHAEL MANDLE ET AL.
No. 3606. Eq. doc., 13.

The undersigned, on oath, says as follows:

On the eleventh day of November, 1874, the plaintiffs filed in this case their supplemental bill making the board of audit of the District of Columbia, the commissioners of the sinking fund of said District, John C. Mulford and others parties defendant thereto, and on the same day this court passed an order in the case which, among other things, restrained the said commissioners of the sinking fund from exchanging for
certificates number 457 and number 4780 of the auditor of the
44 Board of Public Works of said District, bonds of said District,
and restrained the defendant John C. Mulford from receiving certificate of said board of audit in settlement of said certificates number 4780, and from transferring his right to the same; on the 14th day of November, 1874, by direction of the undersigned the following advertisement was published conspicuously in the Evening Star, a newspaper published in this District:

In the supreme court of the District of Columbia.

WILLIAM W. BALLARD AND OTHERS, COMPLAINANTS,
*vs.*
MICHAEL MANDLE AND OTHERS, DEFENDANTS.
No. 3606. Equity docket, 13.

Upon motion of Mr. A. S. Worthington, solicitor for the complainants, and upon its appearing to the court that the defendants,
45 John C. Mulford, T. W. Riley, J. F. Emmons, A. Sober, The First
National Bank of the City of New York, The Middletown National Bank of Middletown, in the State of New York, and E. P. Goodwin, are not inhabitants of the District of Columbia, and are not to be found therein, it is this 13th day of November, 1874, ordered that said defendants be directed, and they hereby are directed, to appear and plead, answer or demur, to the complainants' original and supplemental bills, on or before the 8th day of December, 1874; provided a copy of this order be published once a week for three weeks in the Evening Star, a newspaper published in the District of Columbia; and provided further that, if practicable, a copy of this order be served upon each of said defendants on or before the 25th day of November, 1874.

By the court.

A. WYLIE.

A true copy. Test:

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
*Ass't Clerk.*

46 "The public is hereby notified that the certificates of the auditor of the late board of public works, Nos. 4780, 4319, 4706, 135, 457, and 458, and the certificates of the present board of audit, Nos. 7051, 7336, 7050, 7337, 7082, and 7335 are owned by the undersigned, and that payment or settlement of said certificates has been enjoined by the court in the above-entitled cause. All persons interested are referred to the papers in said cause for further information on the subject.

"THE BALLARD PAVEMENT COMPANY."

The holder of said certificate number 457 was not made party to the
suit because the plaintiffs did not know who he was, although they had
repeatedly applied to the board of audit for information relative
47 thereto, and had been as repeatedly informed by said board of
audit that it—said certificate number 457—had not been presented
to said board by anybody.

This statement was made by said board of audit on the day before said supplemental bill was filed and has been repeated since. Written notice of said restraining order was served upon said board of audit on the 12th day of November, said notice being endorsed upon the summons served on said board by the marshal.

On the same day summons and a copy of said restraining order in
due form were served upon the commissioners of the sinking fund. On
the 17th day of November, 1874, the defendant Mulford was duly summoned by the marshal, and was at the same time served by the
48 marshal with a copy of said injunction or restraining order so
far as it related to said certificate number 4780; and this service
was made in the city of Washington in said District.

The undersigned further avers that said certificate number 457 had been presented to said board of audit for settlement long before said supplemental bill was filed, and is now admitted by said board. It was presented on or about the day of , 1874, by one William H. West, a resident of this District.

On the 5th day of December, 1874, said West, as the undersigned believes, with full knowledge of said testimony order, and with the intention of disregarding it and for the purpose of evading it, made a
49 pretended assignment of said certificate to one Peter Campbell, a
broker dealing in such certificates, also a resident of said District.
On the same day said Campbell obtained from the clerk of this court a certificate that Michael Mandle, Aistrop & Dudley, the Board of Public Works, and H. L. Horton & Company only were defendants to the original bill in this case.

This clerk's certificate said Campbell on the same day presented to the board of audit, pretending that no others than those named in it were parties defendant in the suit, studiously concealing the fact that the board of audit, the commissioners of the sinking fund, John C. Mulford and others had been made parties by the supplemental bill.

50 On the same day (Dec. 3d) said Campbell, with the knowledge
and by the direction of said West, as the undersigned believes,
obtained from said board of audit their certificate number 8725 for $5,155 in settlement of said certificate number 457 and the interest due thereon, and signed a receipt therefor in this way: "William H. West, per Peter Campbell, att'y."

On the next day, December 4th, said Peter Campbell having at the time full knowledge of said restraining order, obtained from the commissioners of the sinking fund bonds of the District of Columbia in exchange for said certificates of the board of audit number 8725 to the full amount thereof.

On the day of December, 1874, Congress, passed and on
51 the day of December, 1874, the President approved the follow-
ing act:

"Joint resolution to continue the board of audit to examine and audit the unfunded or floating debt of the District of Columbia.

"Be it resolved by the Senate and House of Representatives of the
United States of America in Congress assembled, That the board of
audit constituted by section six of the act entitled 'An act for the gov-
ernment of the District of Columbia and for other purposes,' approved
June twentieth, eighteen hundred and seventy-four, be continued until
otherwise provided by law, with all the powers and duties specified in
said section, and with compensation to the members of the board
52 at a rate proportioned, according to time, to that granted in said
act, and payable as therein provided; and the time for presenting
claims is hereby extended for the period of thirty days from this date;
and persons having sustained damages to real estate, but failed to pre-
sent the same to the board of public works, may present the same for
audit and allowance within the time above limited, as specified in the
seventh class of claims mentioned in said sixth section: Provided, That
when the title to claims evidenced by certificates of the auditor of the
board of public works is involved in suits now pending in any court of
competent jurisdiction, such court shall not be ousted of jurisdiction in
respect of such question of title; and after the board of audit
53 shall have ascertained the amount, if any, due upon any such
claim, the certificates of said board of audit shall be issued and
be convertible in favor only of the person finally adjudged in such suit
to be entitled thereto, and when said party may by law have execution
of such judgment or decree.

"SEC. 2. That said board of audit shall proceed forthwith to examine
and audit the accounts of the treasurer and auditor of the late board
of public works according to the provisions of the said act, entitled 'An
for the government of the District of Columbia, and for other pur-
poses,' approved June twentieth, eighteen hundred and seventy-four, as
required by said act, and shall specifically report whether the ac-
54 counts of said treasurer were so kept from day to day as to show
his payments of currency or bonds, to whom paid, and on what
authority; whether or not the moneys and other assets which were re-
ceived by or under the control of said treasurer have been properly
accounted for by said treasurer; and what, if any, of such moneys or
other assets have been paid out or disposed of by said treasurer without
auditor's warrants or certificates therefor; what, if any, payments were
made without evidence that the same were made for or on account of
the public improvements in the District of Columbia, made by the said
board of public works; what, if any, payments were made upon illegal
or irregular warrants, accounts or vouchers; and what, if any,
55 amount remains in the hands of said treasurer; and to the end
aforesaid and to enable the said board of audit to complete the
duties assigned thereto in said act, said board shall have all the powers
and perform all the duties in said act set forth; and shall make report
of their proceedings herein and pursuant to said act, together with all
oral testimony hereafter taken by them, to Congress at the present ses-

sion thereof, not later than the fifteenth day of February, eighteen hundred and seventy-five.

"Approved December 21, 1874.

"DEPARTMENT OF STATE,
"*Washington, January* 4, 1875.

"A true copy.

"SEVELLON A. BROWN,
"*Chief Clerk.*"

56 On the 10th day of December, 1874, the defendant Mulford, in defiance of the order of this court, assigned and transferred to said Peter Campbell, in writing, said certificate number 4780; and on the 12th day of the same month, by means of said assignment, and by means of the deception practiced by him upon said board of audit in reference to said clerk's certificate, said Campbell obtained from said board of audit their certificate number 8753 for $2,412.99, in settlement of said certificate number 4780, and signed a receipt for the same in this way, "John C. Mulford, by Peter Campbell, att'y," and on the same day (December 12th) said Campbell obtained from the commissioners of the sinking fund bonds of the District of Columbia in exchange 57 for said certificate of the board of audit number 4780, and to the full amount thereof.

A. S. WORTHINGTON.

The facts stated in the foregoing paper are true to the best of my knowledge and belief, and are obtained from the board of audit, the commissioners of the sinking fund, the clerk of the court, and the papers on file with the board of audit.

A. S. WORTHINGTON.

Sworn and subscribed to before me this 28th day of December, 1874.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
*Asst. Clerk.*

58 *Order to show cause why attchm't for contempt should not issue.—Filed Dec.* 28, 1874.

In the supreme court of the District of Columbia.

WILLIAM W. BALLARD ET AL.
*v.*
MICHAEL MANDLE ET AL.
} No. 3606. Eq. doc., 13.

Upon motion of the solicitors for the plaintiff, and in consideration of the affidavit filed in this case this day made by A. S. Worthington, it is this 28th day of December ordered that the defendant, John C. Mulford, and Peter Campbell and William H. West, shall show cause on the 5th day of January, 1875, at 11 o'clock a. m., why an attachment for contempt ought not to issue against them, and each of them, provided a copy of this order be served upon them on or before the first day of January, 1875.

By the court.

A. W.

Served copy of order on each one of the def'ts.

A. SHARP,
*Marshal.*

DEC'R 31ST, 1874.

59 *Answer of John C. Mulford.—Filed Jan. 6, 1875.*

In the supreme court of the District of Columbia.

WILLIAM W. BALLARD ET AL.
*vs.*
MICHAEL MANDLE ET AL.
No. 3606. Eq. doc., 13.

I, John C. Mulford, on oath, declare and say I have received a notice to appear before this honorable court and show cause why an attachment for contempt should not issue against me.

I have read the affidavit of A. S. Worthington in support of the motion on which the notice referred to was issued. The statement therein contained that "On the 10th day of December, 1874, the defendant Mulford, in defiance of the order of this court, assigned and transferred to said Peter Campbell, in writing, said certificate number 60 4780," is entirely incorrect. I never made any assignment or transferred my right to said certificate to said Campbell or any other person.

Being exceedingly busy in my own employment as one of the bookkeepers in Willard's Hotel, and not having time to attend personally to the matter, I employed Peter Campbell, who had transacted other business for me, to look after the certificate and attend to the business connected with the same, and having done so, paid no further attention to it, leaving everything connected with it to the discretion and attention of my agent or attorney, Peter Campbell.

I admit that as stated in the affidavit of Mr. Worthington, that 61 I was served with the restraining order, but I paid very little attention to it, for the following reason, regarding it as a mere matter of form and a mistake, to wit, when I bought the certificate named, I showed the same to William W. Ballard, and told him that I had bought it, and asked him if it was all right. He examined said certificate and handed it back to me and said that it was all right, and I was safe in buying it.

Second. That I did not attempt to collect said certificate after the service on me of the restraining order until after I had been informed by Mr. L. S. Crounse that the injunction had been raised, and the certificate cleared and I could go ahead and collect it. I had before this showed the papers of Mr. Crounse, who was introduced in similar 62 matters, and had asked him to inform me when the certificates were clear of the injunction. Mr. Crounse gave me the statement before mentioned in a note which I destroyed at the time, or mislaid, as I cannot find it now. I believe that this can be verified by Mr. Crounse.

Third. He knew of the information given to me by Mr. Ballard and by Mr. Crounse, when the matter was settled by the payment to me by Mr. Campbell of the proceeds of said certificate. I supposed that all proper steps had been taken, and did not suppose anything to the contrary. If I had, I would not have accepted the bonds, which Mr. Campbell procured for me. Nothing was further from my intention 63 or wish than to violate any order of the court, and I expressly declare that I have never knowingly or intentionally done.

I have never been a party to a suit, or a witness in a suit, and am entirely ignorant of proceedings in court. I have sufficient means to make good the value of the certificate referred to, and I humbly pray that the honorable court, regarding all the statements heretofore made, may permit me to tender such bond for the purpose named or may seem proper to the honorable court; and further, that I may be permitted to make answer as defendant in the suit before named.

JOHN C. MULFORD.

Sworn and subscribed before me this 7th day of January, A. D. 1875
[SEAL.] SAM'L C. MILLS, *J. P.*

64 *Order, &c.—Filed Jan. 8, 1875.*

In the supreme court of the District of Columbia.

WM. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc., 13.
MICHAEL MANDLE ET AL.

This coming on to be heard upon the motion of the plaintiff's solicitor for an attachment for contempt against Peter Campbell, William H. West, and the defendant John C. Mulford, and upon the affidavit filed in support of said motion and those filed in reply to it, after consideration thereof and after argument by counsel for the respective parties, it is this 8th day of January, 1875, ordered that the rule to show cause, and passed in this case on the 28th day of December, 1874, be and the same is hereby discharged as to the said William H. West; 65 that the defendant John C. Mulford be and he is hereby required and directed to deliver up to the clerk of the court, on or before the 14th day of January, 1875, the identical bonds received by him or by his agent, Peter Campbell, from the commissioners of the sinking fund, in exchange for the certificate of the board of audit numbered 8753, or other bonds of the same kind to the amount of $2,400.00; and the clerk shall hold said bonds to await the final decree of the court in this case; and in case said Mulford shall not comply with this order within the time limited an attachment for contempt shall be issued against him.

And it is further ordered that as to Peter Campbell said matter of proceedings against him for contempt be and hereby is referred 66 to R. D. Mussey, esq., an examiner of this court, to take testimony in relation thereto and return the same into court. And said examiner shall allow the plaintiffs to adduce testimony to and including the 15th instant, and shall then allow the said Peter Campbell to adduce testimony in his behalf to and including the 25th instant, and shall finally allow the plaintiffs to adduce evidence in rebuttal to and including the 28th instant, and shall then immediately return the evidence taken into court. And further proceedings under said rule to show cause as against said Peter Campbell are deferred until the 29th instant, at 11 o'clock a. m., or as soon thereafter as the court shall be in session.

By the court.

A. W.

67 *Amended and supplemental bill.—Filed Feb. 4, 1874.*

In the supreme court of the District of Columbia.

William W. Ballard et al.
*vs.* } No. 3606. Eq. doc., 13.
Michael Mandle et al.

Amended and supplemental bill.

To the supreme court of the District of Columbia, holding an equity court for said District:

The plaintiffs complain as follows:

1. That the defendant, The First National Bank of New York, in its answer to the first supplemental bill filed in this case, claims that the certificate No. 136 for $5,000, in these proceedings mentioned, was presented to the board of audit by said bank for F. H. Cobb, who said bank avers is the owner thereof. Said F. H. Cobb is Frederick H.
68 Cobb, a resident of this District. The plaintiffs, upon this information, aver that said Cobb is the holder of said certificate. Said certificate No. 136 was issued by the board of public works to Zepheriah Jones, for work done by him for said board, and said Jones immediately transferred said certificate and assigned the claim which it evidenced to the plaintiffs, in satisfaction of his pre-existing indebtedness to them.

2. Upon the information contained in the answers of the defendants Andrew Soher, E. P. Goodwin, and J. F. Emmons, filed in this case on the 5th day of January, 1875, and upon other information, the plaintiffs aver that the said First National Bank of New York is now the
69 holder and claims to be the owner of the board of audit certificates No. 7051, 7336, 7050, 7337, 7082, and 7335 in the first supplemental bill in this case mentioned, and has presented or is about to present said certificates to the board of sinking fund commissioners of the District of Columbia to be exchanged for bonds of said District.

3. As to the certificate of the board of public works No. 147 for $1.603.97, for which the defendant Francis H. Morgan has heretofore obtained certificates of the board of audit as in the first supplemental bill in this case set forth, the plaintiffs say that said certificate was originally issued by said board of public works to one John S. Baldwin by direction of the firm of Finnegan and Nesdale, in whose name
70 it was issued, and who were indebted to said Baldwin and had assigned the claim evidenced by said certificate to him, and that said Baldwin immediately transferred said certificate and assigned the claim which it evidenced to the plaintiffs in part payment of his indebtedness to them. And the plaintiffs continued to be the holder of said certificate thenceforward till they deposited it with the defendant Michael Mandle under the circumstances and for the purpose set forth in the original bill in this case.

4. The plaintiffs further aver that since the original bill in this case was filed, to wit, in August or September, 1874, George Follansbee, a resident of the District of Columbia, was the holder of the certificate of the auditor of the board of public works, No. 457, for $5,000, in
71 said original bill mentioned; that in September, 1874, said Follansbee caused said certificate to be presented to said board of audit; that some time thereafter and before the third day of December,

1874, said Follansbee entered into an agreement with Peter Campbell, also a resident of said district, whereby said Campbell agreed, notwithstanding the order of this court then in force, of which they both had notice, forbidding it, to obtain bonds of the District of Columbia from the board of sinking fund commissioners in settlement of such certificate; that on the third day of December, 1874, *and* Campbell obtained from said board of audit their certificate No. 8725 for $\$5,155$, in settlement of said certificate No. 457, and accrued interest thereon;
72 that on the next day said Campbell presented said certificate No.
8725 to said board of sinking fund commissioners; that he concealed from them the fact that it was one of the certificates the settlement of which was enjoined, and obtained from them in exchange for said certificate No. 8725, bonds of the District of Columbia to the full amount thereof; and that the said Campbell soon afterwards sold said bonds and obtained therefor in cash $\$3,486\frac{00}{100}$, of which sum he paid to said Follansbee $\$3,125\frac{00}{100}$, and retained the remainder, as previously agreed between him and said Follansbee.

*Prayer.*

1. The plaintiffs thereupon pray that said Frederick H. Cobb, Peter Campbell, and George Follansbee may be made additional parties defendant to this suit.

73 2. That said George Follansbee and Peter Campbell may be required to deliver up to the court the bonds of the District of Columbia, which they obtained for said certificate No. 8725, or the proceeds thereof, in such proportion as the court may direct, to be held subject to the final decree in this case.

3. That the writ of subpœna may issue out of this honorable court against the defendants Frederick H. Cobb, Peter Campbell, and George Follansbee, commanding them to appear at some certain day to be named therein, to answer the original, amended, and supplemental bills in this case, and against the defendants Francis H. Morgan and The First National Bank of New York, commanding them to appear in like
74 manner to answer this amended and supplemental bill, and requiring all said defendants to abide by and perform such order and decree as may be passed herein; and for such other and further relief as the nature of the case may require.

The defendants against whom process is prayed in this amended and supplemental bill are Frederick H. Cobb, Peter Campbell, George Follansbee, Francis H. Morgan, and the First National Bank of New York.

A. S. WORTHINGTON,
*Solicitor for Plaintiffs.*

I do solemnly swear that I have read the foregoing amended and supplemental bill by my solicitor subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge
75 are true, and that the facts therein stated upon information and belief I believe to be true.

WILLIAM H. BALLARD.

Sworn to and subscribed before me this 2d day of Feb'y, 1875.
[SEAL.]
J. J. CURTIS,
*Notary Public.*

This amended and supplemental bill may be filed.

A. WYLIE.

FEBRUARY 4, 1875.

*Notice of motion, &c.—Filed Feb. 13, 1875.*

In the supreme court of the District of Columbia, Feb'y 12, '71.

W. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc. 13.
M. MANDLE ET AL.

76 Take notice that on Tuesday, the 16th inst., at 10 a. m., or as soon thereafter as we can be heard, we shall move the court to require the defendant Follansbee to pay into court bonds of the Dist. of Columbia to amount of $5,155, by some early day to be named by the court under penalty of attachment for contempt. This notice will be supported by the depositions taken in the case in the matter of the alleged contempt by Peter Campbell.

STANTON & WORTHINGTON,
*Sol'c'rs for Compl'ts.*

To JOHN E. NORRIS, Esq.,
*Sol'c'r for Follansbee.*

*Notice of motion.—Filed Feb. 13, 1875.*

In the supreme court of the District of Columbia.

W. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc. 13.
M. MANDLE ET AL.

77 Take notice that on Tuesday, the 16th inst., at 10 a. m., or as soon as we can be heard thereafter, we shall call up the motion in this case for an attachment against Peter Campbell for contempt.

STANTON & WORTHINGTON,
*Sol'c'rs for Compl'ts.*

To W. A. COOK, Esq.,
*Of Counsel for Campbell.*

*Answer of Follansbee.—Filed Feb. 16, 1875.*

In the supreme court of the District of Columbia, holding an equity court.

WILLIAM BALLARD ET AL.
*vs.* } No. 3606. Eq. doc. 13.
MICHAEL MANDLE ET AL.

The answer of George Follansbee, one of the defendants in the above-entitled cause, to the amended and supplemental bill of the plaintiffs, filed on the 4th day of February, 1875.

78 This defendant, saving and reserving, &c., for answer to said bill, or to so much and to such parts thereof as he is advised is material and proper for him to make answer unto, answers and says:

1, 2, 3. That he has no personal knowledge of the allegations and statements contained in the first, second, and third paragraphs of the said amended and supplemental bill, and is not prepared to say whether the same may or may not be true.

4. This defendant admits that he was the holder of the certificate of the auditor of the Board of Public Works No. 457, for $5,000.00, in the month of August and September, 1874; but he further says that

79 he does not know that the same is mentioned in the original bill
filed in this cause, as he was not a party thereto and had no per-
sonal knowledge of said bill or its contents.

That in the months of August and September, 1874, this defendant
was both the holder and owner of said certificate; that he was then en-
gaged in the broker business in company with Mr. W. H. Slater, and
that he purchased the said certificate of Mr. John W. Starr, who was
also engaged in the broker business; that he purchased it at a fair val-
uation without any knowledge or intimation of any claim or asserted
right of any other person, just as he was in the habit of buying other
paper or securities put upon the money-market; that he purchased
80 said certificate as aforesaid, No. 457, in the latter part of January,
1874; that he had no notice of any order of court forbidding the
sale of it when he sold it to Mr. Peter Campbell; that whether or not
Mr. Campbell had notice this defendant has no knowledge; but he avers
that he had no notice of the claims of the plaintiffs or any other person
upon the same; that when he made the sale it was absolute and with-
out any private understanding between him and Mr. Campbell; that he
does not know of Campbell presenting the said certificate the next day
after his obtaining it to the sinking fund commissioners, or that he con-
cealed from them the fact that it was one of the certificates the settle-
ment of which was enjoined; this defendant does not know what
81 bond or bonds Mr. Campbell received except from Mr. Campbell's
own statement; that this defendant does not know for what
amount the said Campbell sold the said bond obtained from the conver-
sion of the said certificate into a bond, that is, what he obtained for
said bond; but he admits that he received $3,125 from Mr. Campbell on
the purchase of the board of auditor's receipt, as I had before returned
in for conversion in the new board of audit, and took a receipt therefor,
for which receipt, as before stated, he paid this defendant the sum last
mentioned.

Since then this defendant says that he has been informed that the
said Campbell procured an auditor's certificate for $5,155, which I have
also been informed he converted into bonds. Of neither of these
82 transactions last mentioned this defendant says he has no knowl-
edge.

This defendant positively denies that there was any agreement, expressed or implied, that the remainder of the amount of said certificate over the sum of $3,125 was to be retained by the said Campbell; nothing of the kind took place or was thought of; the said sale, as before stated, having been absolute and unconditional.

And further answering, this defendant humbly submits to the honor-
able that he acquired a lawful and just title to the said certificate,
and that in equity ought not to be called upon to account to plaintiffs.
And he further says that he is entirely solvent, being worth in
83 real estate at least $40,000, besides his large personal property,
and that during the litigation in the premises he ought not in any
event be required to pay into court the said certificate or its equivalent
until the rights of the parties shall have been fully adjudicated.

And having answered, this defendant prays to be dismissed hence with his reasonable costs in this behalf expended.

JOHN E. NORRIS,
*Sol'r for G. Follansbee.*

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated on my personal knowledge are true, and that the facts therein stated on the information of others I believe to be true.

GEO. FOLLANSBEE.

Subscribed and sworn to before me on the 17th day of February, A. D. 1875.

[SEAL.]

HOWARD M. NORRIS,
*Notary Public.*

84 *Order appointing receiver.—Filed Feb. 25, 1875.*

In the supreme court of the District of Columbia.

W. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc., 13.
MICHAEL MANDLE ET AL.

Upon motion of the solicitors for the complainants and after argument by the counsel for the complainants and defendants respectively, it is this 25th day of February, 1875, ordered that John Selden be and he is hereby appointed a receiver to collect from the defendants the certificates of indebtedness in their possession or subject to their control which are mentioned in the original and supplemental bills in this case, and to convert them in the manner provided by law into bonds of the District of Columbia, known as the three-sixty-five bonds,
85 and to hold said bonds pending this suit; and the defendants and
each of them are hereby directed to deliver up to said receiver and to assign to him in writing such of said certificates of indebtedness as they respectively may hold or control: Provided that said receiver shall first file in court a bond, with sureties approved by the court, in the sum of twenty thousand dollars, conditioned for the faithful performance of his duties as receiver. And provided that if any of the certificates of the board of audit mentioned in the first supplemental bill in this case include any indebtedness other than that growing out of the auditor's certificates mentioned in the original bill, it shall be a sufficient compliance with this order for the defendant owning
86 or controlling such board of audit certificates to deliver to said
receiver three-sixty-five bonds of said District equal in amount to the face value of the auditor's certificate or certificates mentioned in the original bill so included, with interest thereon from the date of such auditor's certificate or certificates to August 1st, 1874.

And it is further ordered that the clerk of this court shall deliver to said receiver, when his bond shall have been approved and filed, the District bonds heretofore received by said clerk from the defendant, Mulford.

By the court—

A. W.

87 *Ans. of Campbell—Filed Apl. 6, 1875.*

In the supreme court of the District of Columbia, as a court of equity.

BALLARD PAVEMENT COMPANY, COMPL'TS,
*vs.* } No. 3606. Eq. doc., 13.
MICHAEL MANDLE ET AL., DEF'TS.

The answer of Peter Campbell, one of the defendants in the above-entitled cause, to the amended and supplemental bill of the complainants, filed on the 4th day of February, 1875.

This defendant, saving and reserving, &c., for answer to said bill or

to so much or such part thereof as he is advised is material and proper
for him to make answer unto, answers and says:

1, 2, 3. That as to the allegations and statements contained in the
first, second, and third paragraphs of the said amended and sup-
88 plemental bill, he has no knowledge whatever, and is unable to
say whether the same be true or untrue.

4. As to the allegations and statements made in the fourth para-
graph of said amended and supplemental bill, the defendant believes
that in August or September, 1874, George Follansbee was the owner
of the certificate of the auditor of the Board of Public Works No. 457
for $5,000; but he is informed and believes that in September, 1874, one
William H. West was the holder of said certificate, the same having
been pledged to him by said Follansbee, as the owner of the same, as
security for his endorsement of said Follansbee's note for $3,000, and
said certificate was presented by said West to the board of audit on or
about September 25th, 1874.

89 Said defendant admits that after the date last before mentioned,
and prior to the third day of December, 1874, he had an under-
standing with said Follansbee with regard to the collection of said cer-
tificate No. 457, but he expressly denies that he had, on or before said
third day of December, 1874, any notice, knowledge, or information that
there was any order of this court touching said certificate No. 457, or
forbidding any action thereon or therewith by any person whatever.

The defendant admits that he received on the third day of December,
1874, in settlement of said certificate No. 457, a certificate of the board
of audit No. 8725, for $5,155, and the next day, upon said certificate 8725,
received from the commissioners of the sinking-fund bonds of the
90 District of Columbia to the amount of $5,150; but he expressly
denies that he concealed from said commissioners the fact that
certificate No. 457, upon which certificate 8725 was based, had been
enjoined. On the contrary, he positively declares that he did not then,
or previously, have any notice, knowledge, or information that said cer-
tificate No. 457 had been enjoined, and made no statement of any sort
whatever to said commissioner concerning it.

The defendant admits that he sold said bonds of the District of Co-
lumbia obtained for said certificate No. 8725, and received for the same
about the sum of $3,486.

He declares that he accounted to said Follansbee for $3,125 by
91 paying his note at bank and leaving a certain sum for him there,
taking a remainder of $361, or about that sum, as near as he can
remember, and the further sum of $10 paid him by said Follansbee,
making in all the sum of 371, as near as he can remember, which he
admits that he retained as previously agreed upon between him and
said Fallansbee, except as to the sum of $10, before mentioned, and which
was not more than the ordinary charge for collecting auditor's certificates
and converting into bonds.

And this defendant, further answering, says that the agreement which
he made with Follansbee was as follows:

Follansbee employed defendant to collect and convert said certificate
early in October, 1874, and told him all that he, Follansbee,
92 wanted to realize out of it was 62½ cents on the dollar, which
would pay his, Follansbee's, note for which the certificate was
pledged, and if he, defendant, could get over 62½ cents on it he could have
the surplus. This was rather more than certificates were worth at that
ime, but they were steadily advancing. The defendant collected said
certificate No. 457, and sold the bonds procured for the same at 67⅝

cents on the dollar and accounted to said Follansbee for 62½ cents on
the dollar, upon the face value of the auditor's certificate, viz, $5,000.
The difference between 62½ cents on the dollar and the sum defendant
sold the bonds for, he, the defendant, regarded as simply a mode of fix-
ing the charge for his services, and he did not at any time buy, or
93 consider that he in fact bought the certificate, or owned it at any
time, or had any interest in it, save as to the surplus over 62½ cents
on the dollar, and except as to that excess was in all respects acting as
the broker and agent of said Follansbee. The difference named, amount-
ing to $361, was less than the usual charge for collecting and converting
auditor's certificates. Said Follansbee paid him in addition $10, which
was less than the usual charge for selling bonds on such amounts.

And further answering this defendant humbly submits to this honor-
able court that in the above transaction he acted in the ordinary and
usual course of his business as a broker and agent for said Fol-
94 lansbee; that he was not informed and did not know that the cer-
tificate in question had been enjoined in any way; that the sums
of $361 and $10, which were all that he received for himself, were less
than the ordinary charges for collecting and converting auditor's certifi-
cates and selling the bonds, and that the bonds which he received in
conversion of the certificate before named were sold immediately after
their receipt, and he then paid over and accounted to George Follansbee
for all but $361 of the proceeds, all of which took place long before the
filing of the amended and supplemental bill, and before he knew that
said certificate 457 had been enjoined, wherefore he says that in equity
he ought not to be compelled to deliver up to this court any part of the
proceeds of said certificate No. 457.

95 And having answered, this defendant prays to be hence dis-
missed with his costs in this behalf sustained.

PETER CAMPBELL.

GEO. W. DYER,
*Solicitor for Peter Campbell.*

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated on my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

PETER CAMPBELL.

Subscribed and sworn to before me this 5th day of April, 1875.
[SEAL.] HOLMES E. OFFLEY,
*Notary Public.*

96 *Replication.—Filed Ap'l* 8, 1875.

In the supreme court of the District of Columbia.

W. W. BALLARD ET AL.
*vs.*
MICHAEL MANDLE ET AL.
} No. 3606. Eq. doc. 13.

The plaintiffs join issue upon the answer of the defendants Emmons, Goodwin, and Soher to the original bill in this case and the supplemental bill filed November 11th, 1874; and upon the answer of the defendants George Follansbee, Peter Campbell, and F. H. Morgan to the amended and supplemental bill filed February, 1875.

A. S. WORTHINGTON,
*Solicitor for Plaintiffs.*

97 *Decree pro confesso against certain def'ts.—Filed Ap'l 8, 1875.*

In the supreme court of the District of Columbia.

W. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc. 13.
MICHAEL MANDLE ET AL.

On motion of the solicitors for the plaintiffs, and on its appearing to the court that the defendants, Edward P. Aistrop and Henry H. Dudley, though duly summoned to answer the original bill in this case on the 26th day of February, 1874, have failed to enter their appearance herein; that the defendant, John C. Mulford, though duly summonsed on the 18th day of November, 1874, to answer the exigency of the original bill and the supplemental bill filed November 11th, 1874, has failed to plead, answer, or demur to the said bills or either of
98 them; and that the defendants, the Board of Audit and the Commissioners of the Sinking Fund of the District of Columbia, though duly summonsed on the 14th day of November to answer said original and supplemental bills, have failed to enter their appearance herein: It is this 8th day of April ordered, adjudged, and decreed that said original bill be, and it hereby is, taken for confessed as against the defendants Aistrop and Dudley; and that said original and supplemental bills be, and they hereby are, taken for confessed as against the defendants John C. Mulford, the Board of Audit, and the Commissioners of the Sinking Fund of the District of Columbia.

By the court.

A. W.

99 *Pro confesso vacated as against Mulford & 1st Nat'l B'k.—Filed Ap'l 1, 1875.*

In the supreme court of the District of Columbia.

WM. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc. 13.
MICHAEL MANDLE ET AL.

By consent of the parties interested, evidenced by the signatures of their respective solicitors hereto subjoined, it is this 21st day of April, 1875, ordered that the decree pro confesso heretofore taken against the defendants, John E. Mulford and the First National Bank of New York be, and they hereby are, set aside, and said defendants have leave to file this answer herein, provided that this order shall not be operative as to the said bank, unless within one week from date of this decree it shall have delivered into the registry of the court for transfer into the custody of John Selden, esq., receiver in this case, bonds of the District of Columbia, known as the 3.65 bonds, to the amount of sixty-five hundred dollars ($6,500); this order not to prejudice the taking of depositions under any notice heretofore given.

By the court.

A. W.

We consent.

STANTON & WORTHINGTON,
*Solicitors for the Pl'ffs.*
WILLIAM A. COOK,
*Sol'c'r for Mulford and First Na'l Bank of N. Y.*

100 *Ans. of Mulford.—Filed Ap'l 21, 1875.*

In the supreme court of the District of Columbia.

BALLARD PAVING COMPANY
*vs.* No. 3606. Eq. doc. 13.
MANDLE ET AL.

The separate answer of John C. Mulford to the amended and supplemental bill of the above-named plaintiff:

In answer to said bill this defendant says as follows, viz:

1st. That he was the owner of certificate No. 4780 for the sum of $2,329.14 issued by the late Board of Public Works of the District of Columbia, and that it is correct that said certificate has been presented to the board of audit of said District for examination and audit, as provided in the act of Congress of June 20th, 1874.

101 2nd. He says that said certificate was purchased by him from Frank Ridlow, now of Abington, Massachusetts, and late of Washington, D. C., and on information and belief, he says that it was purchased by said Ridlow from              , after an interview had by him with William Ballard, president of the Ballard Paving Company, and representing it. That said Ridlow called in person on said Ballard, prior to the purchase of the certificate, and stated to him that he intended to purchase it if it was all right; that the said Ballard examined his signature, which was on the back of said certificate, and handed it to the book-keeper of the company to examine, and after such examination the said Ballard stated to the said Ridlow that
102 the certificate was all right, and encouraged him to purchase it, and having this assurance and encouragement from the said Ballard, he purchased the same.

He further says, on information and belief, that at the time of said purchase the said Ballard, neither directly nor indirectly, pretended or intimated that the said Ballard, or the Ballard Paving Company, had any interest in said certificate or claim thereto of any character.

He further says, on information and belief, that said certificate was passed out of the possession of said company for valuable consideration in course of business.

3rd. He further says that he purchased the said certificate from
103 the said Ridlow, after a full statement from him of the mode in which he procured it, and of the assurance of the said Ballard that it was all right, and that neither he nor the Ballard Paving Company had any interest therein, and that he purchased the same from the said Ridlow for its full market value, and in the regular course of business, and without any malice whatever, of any claim of said Ballard Paving Company to said certificate. That after making such purchase he informed the said Ballard of what he had done, and asked him if it was all right. He took the certificate into his hands, examined it and handed it back to this defendant, saying that it was all right, and that the defendant was safe in buying it.

104 This was on or about the 17th of January, 1874, at Willard's Hotel, in Washington, D. C., and from that time until the filing of the bill in this case, so far as he has been able to ascertain, neither the said Ballard nor the said Ballard Paving Company, in any form set up any claim to said certificate.

4th. He further says that the claim now set up is unjust, fraudulent, and void; and that the plaintiff, in view of the facts, is estopped from claiming said certificate, or any paper which may be authorized to be issued by any law of the United States in lieu thereof.

He further submits that there is no equity in the claim of the plaintiff as presented against this defendant, and he asks that he may
105 have the same advantage of this defense as if he had set up the same by demurrer.

This defendant, having fully answered, prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN C. MULFORD.

DISTRICT OF COLUMBIA, *ss :*

I do solemnly swear that I have read the answer by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

JOHN C. MULFORD.

Sworn and subscribed to this 19 day of March, 1875.

R. J. MEIGS, *Cl'k*,
By L. P. WILLIAMS,
*Ass't Cl'k.*

106 *Replication.—Filed May* 5, 1875.

In the supreme court of the District of Columbia.

W'M W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc., 13.
MICHAEL MANDLE ET AL.

The plaintiffs join issue upon the answer of the defendant, The First National Bank of New York, filed in this cause May 3rd, 1875.

STANTON & WORTHINGTON,
*Sol'c'rs for Plaintiff.*

And the plaintiffs join issue upon the answer of the defendant Mulford filed in this cause April 21st, 1875.

STANTON & WORTHINGTON,
*Sol'c'rs for Plaintiff.*

107 *Order enlarging time for taking test'y.—Filed June* 9, 1875.

In the supreme court of the District of Columbia.

WM. W. BALLARD ET AL.
*vs.* } No. 3606. Eq. doc., 13.
MICHAEL MANDLE ET AL.

On motion of the solicitors for the plaintiffs, it is ordered this 9th day of June, 1875, that the time for taking testimony in this be, and it hereby is, enlarged till the 30th day of June, 1875, the complainants' evidence in chief to be closed on or before the 12th of June, the defendants' evidence to be closed on or before June 28th, and the complainants to close their evidence in rebuttal within two days following.

By the court.

A. W.

We consent.

STANTON & WORTHINGTON,
*Sol'c'rs for Compl't.*
WILLIAM A. COOK,
*Sol'c'r for 1st Nat. Bank et al.*
JOHN E. NORRIS,
*Sol'r for G. Follansbee.*

108 *Stipulations.—Filed July 20, 1875.*

In the supreme court of the District of Columbia.

BALLARD PAVEMENT COMPANY
*vs.*
MICHAEL MANDLE ET AL. } No. 3606. Eq. doc., 13.

It is agreed that at the hearing of this case the depositions of the defendants Follansbee, Campbell, and Mulford, heretofore taken in the course of the proceedings against them for alleged contempt in connection with this case, may be read in evidence in their behalf, and may be used on behalf of either of the defendants in this case to whom the same may be applicable.

STANTON & WORTHINGTON,
*Solicitors for Plaintiffs.*
WILLIAM A. COOK,
*Sol. for Campbell et al.*

109 *Stipulation.—Filed July 20, 1875.*

In the supreme court of the District of Columbia.

BALLARD PAVEMENT COMPANY
*vs.*
FIRST NATIONAL BANK ET AL. } No. 3606. Eq. doc., 13.

It is agreed at the hearing of this case the deposition of defendant Follansbee, heretofore taken in the attachment for contempt matter, may be read as evidence in his behalf, said defendant not desiring to take further depositions in his behalf.

June 21, 1875.

JOHN E. NORRIS,
*Sol'r for Follansbee.*
E. L. STANTON,
*Sol'r for Compl'ts.*
WILLIAM A. COOK,
*Sol. for Campbell et al.*

The depositions to be used in any case or in reference to any party to whom applicable.

110 The same agreement is also made as to the deposition of Peter Campbell (similarly taken) being used in his own behalf at the hearing.

E. L. STANTON,
*Sol. for Pl'f.*
WILLIAM A. COOK,
*Sol. for Campbell et al.*

The deposition to be used in reference to any party to whom applicable.

JOHN E. NORRIS,
*Sol'r for Follansbee.*

*Referred to gen'l term and time extended for taking test'y.—Filed*

In the supreme court of the District of Columbia.

BALLARD ET AL. *vs.* MANDLE ET AL. } No. 3606. Eq. doc., 13.

This cause coming on to be heard, it is thereupon, this 20th day of July, 1875, ordered that said cause be and is hereby certified to the court in general term to be heard in the first instance, with leave to the parties to take additional testimony up to Sept. 7th, 1875.

By the court.

A. W.

111 *Testimony for compl'ts.—Filed Oct. 8, 1875.*

In the supreme court of the District of Columbia.

W. W. BALLARD ET AL. *vs.* M. MANDLE ET AL. } No. 3606. Eq. doc., 13.

WILLIAM W. BALLARD:

States the transaction out of which this suit grows substantially as it is stated in the original bill. Identifies and puts in evidence receipts given by Mandle and by Aistrop & Dudley, and a memorandum of the numbers, dates, amounts, and payees of the auditor's certificates, which memorandum he made at the time the certificates were handed to Mandle or to Aistrop and Dudley. These papers are appended to deposition, marked Exhibits W. W. B., No. 1, No. 2, and No. 3. Delivered the certificates to Mandle on the 13th January, 1874, including No. 147. Mandle's receipt is dated January 17, 1874. Certificates were 112 delivered in considerable of a hurry, and Mandle said, "Call and get receipt at any time." Complainant Marsh and witness afterwards called and got the receipt. Knows certificates were delivered January 13th, because memorandum made by witness at the time, in evidence, bears that date.

Received certificate No. 147 from John S. Baldwin, who had a contract with the board of public works which he had assigned to us. We furnished the lumber and material, and when Baldwin drew certificate he passed it over to us in payment therefor. Certificate No. 4780 and 457 and 458 we received for work done on our own contracts. These four certificates remained in our possession until delivered to Mandle or Aistrop & Dudley.

113 Soon after delivering certificates learned that they had been disposed of; could not find Mandle nor the certificates; could get no satisfaction from Aistrop & Dudley; thereupon filed bill. When the notes matured, and for some time before, we tried to find who had them, and were ready to pay them at maturity; but they were not presented for payment and we could not find them. Have received no compensation from the District of Columbia nor any other source for work represented by these certificates.

I know defendant Mulford; have no knowledge of his ever showing
me any certificate and asking me if it was good. Mulford said to me at
one time, "I have got your name in the safe," and then I under-
114 stood he had bought one of our certificates, but did not know
what one. Am positive he did not show me a certificate or question me.

Know Frank Ridlon; he came to me at Willard's Hotel shortly before Mulford spoke to me and asked me if the signature on the back of the certificate was genuine; told him it was; Ridlon asked no other questions about the certificate; think this was after delivery of certificate to Mandle; it was before suit was brought when I saw Ridlon had no knowledge or suspicion that Mandle had put these certificates on the market, nor had I when Mulford spoke to me.

Cross-examination:

Do not recollect that any notice was published warning per-
115 sons not to receive these certificates; conversation with Ridlon
was in January, 1874, in the waiting room of Willard's Hotel; do not think I took the certificate he showed me in my hand and examined it; I looked at the signature of the Ballard Pavement Company on the back; do not recollect that anybody else was present; do not think I told Ridlon that the certificate was all right or anything to that effect; he asked me, I think, these very words, "Is that a genuine endorsement?" Did not tell him that we owned the certificate, for I had no idea that it was a certificate that we had; our book-keeper at that time was Edward L. Marsh, a member of our firm; we had in our office at
that time a memorandum showing what certificates we had passed
116 into the hands of Mandle and Aistrop & Dudley; dealt with Ais-
trop & Dudley as brokers; did not expect the money from them, but expected that it was to be paid through their hands.

Redirect examination:

Neither Mandle nor Aistrop & Dudley, nor anybody else, ever gave us notice that the sale of these certificates, or either of them, was contemplated. Before the maturity of either of these notes it was a matter of notoriety in this District that Mandle had engaged in several operations of this kind and had absconded with the proceeds.

117 EXHIBIT W. W. B., NO. 1.

Received from the Ballard Paving Co. $\$10,453\frac{41}{100}$, ten thousand four hundred and fifty-three $\frac{41}{100}$ dollars, in auditor's certificates of the District of Columbia, as collateral to secure the payment of their note of $\$4,181\frac{56}{100}$, four thousand one hundred eighty-one $\frac{50}{100}$ dollars, which is due three months from date, or upon three days' notice.

Washington, January 17th, 1874.

M. MANDLE.

EXHIBIT W. W. B., NO. 2.

JAN'Y 26, 1874.

Received of Ballard Pavement Co., auditor's c't'f's No. 455, $2,065.92; No. 457, $5,000; No. 461, $6,462.80; No. 468, $1,339.03, and No. 458, 1,202.95, amounting to sixteen thousand seventy & $\frac{70}{100}$ dollars, as 118 collatteral security to a stock note for six thousand four hundred twenty eight & $\frac{28}{100}$ dollars at four months from this date.

AISTROP & DUDLEY.

EXHIBIT W. W. B., NO. 3.

Mandl; note, Ja'y 13, '74, $4,181.00, 3 months.

| No. | | Date. | |
|---|---|---|---|
| | | '73: | |
| 4780 | B. P. Co., | Dec. 24 | $2,329 14 |
| 4319 | J. S. Baldwin, | Dec. 5 | 1,020 30 |
| 4706 | J. S. Baldwin, | Dec. 20 | 500 00 |
| | | 1874. | |
| 135 | Z. Jones, | Jan'y 8 | 5,000 00 |
| 147 | J. S. Baldwin, | Jan'y 9 | 1,603 97 |
| | | | 10,453 41 |

Aistrop & Dudley, Jan'y 26th, 4 mo., $6,428.28.

| | | | |
|---|---|---|---|
| No. 458 | B. P. Co., | Jan'y 24th | $1,202 95 |
| 457 | B. P. Co., | " " | 5,000 00 |
| 455 | B. P. Co., | " " | 2,065 92 |
| 468 | B. P. Co., | " " | 1,339 03 |
| 461 | B. P. Co., | " " | 6,462 80 |
| | | | $16,070 70 |

Those marked J. S. Baldwin we received from him, but may have been issued to others.

119 EXHIBIT S. N. W., NO. 4.

No. 4780.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., Dec.* 24, 1873.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work as per schedule, amounting to two thousand three hundred and twenty-nine and $\frac{14}{100}$ dollars.

$2,329$\frac{14}{100}$.

J. C. LAY,
*Auditor.*

(Across the face:) Oct. 7, 1874. Cancelled by board of audit.
(Endorsed on back:) Ballard Pavement Co., per W. W. Ballard.

EXHIBIT S. N. W., NO. 5.

No. 147.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., January* 9, 1874.

I hereby certify that I have this day audited and allowed the

120 account of Finegun & Nesdall, per John S. Baldwin, for work on 6th st. west, bet. M & Boundary, amounting to sixteen hundred and three $\frac{97}{100}$ dollars.
($1,603$\frac{97}{100}$.

J. C. LAY,
*Auditor.*

(Endorsed:) Finegan & Nesdall, per J. S. Baldwin.

EXHIBIT S. N. W., NO. 6.

No. 461.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., January* 24, 1874.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work on Penn'a ave., bet. 1st & 2d st. east, amounting to sixty-four hundred and sixty-two and $\frac{80}{100}$ dollars.
$6,462$\frac{80}{100}$.

J. C. LAY,
*Auditor.*

(Endorsed:) Ballard Pavement Co., per W. W. Ballard. First Nat. Bank, N. Y. Paid.

121 EXHIBIT S. N. W., NO. 7.

No. 468.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., January* 24, 1874.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work on Washington st., from Bridge to Gay st., and west to Stoddard st., Georgetown, amounting to thirteen hundred and thirty-nine and $\frac{03}{100}$ dollars.
$1339$\frac{03}{100}$.

J. C. LAY,
*Auditor.*

(Endorsed:) Ballard Pavement Co., per W. W. Ballard.

EXHIBIT S. N. W., NO. 8.

No. 455.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., January* 24, 1874.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work on 6th st. W., bet. E & F sts. N., amounting to two thousand sixty-five and $\frac{92}{100}$ dollars.
$2,065$\frac{92}{100}$.

J. C. LAY,
*Auditor.*

(Endorsed:) Ballard Pavement Co., per W. W. Ballard. First Nat. Bank, N. Y. Paid.

122 EXHIBIT S. N. W., No. 9.

No. 457.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., January* 24, 1874.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work on 5th st. east, bet. East Cap. & C st. so., amounting to five thousand dollars.

$5,000.00.

J. C. LAY,
*Auditor.*

(Across the face:)

This certificate will be paid in sewer certificates April 1, 1874.

JAMES A. MAGRUDER,
*Tr. Board Public Works.*

(Endorsed:) Ballard Pavement Co., per W. W. Ballard. Wm. H. West.

EXHIBIT S. N. W., No. 10.

No. 458.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., January* 24, 1874.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work on 5 st. east, bet. East Cap. & C st. so., amounting to twelve hundred and two and $\frac{95}{100}$ dollars.

$\$1,202\frac{95}{100}$.

J. C. LAY,
*Auditor.*

(Endorsed:) Ballard Pavement Co., per W. W. Ballard.

123 SAMUEL L. WILCOX:

Is clerk of the board of audit, having special charge of general claims against the District.

(Witness produces auditor's certificates Nos. 4780, 147, 461, 468, 455, 457, and 458, from the files of the board of audit, and copies of them are made and put in evidence, and are hereto appended marked respectively, Exhibit S. N. W. No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, and No. 10.)

A board of audit certificate has been issued upon auditor's certificate No. 458. It was issued to the Middletown National Bank, December 14, 1874, for $1,240.24.

TALMADGE G. BROWN:

I am one of the plaintiffs; came to Washington on the 16th of April, 1874, and remained in city until after the maturity of first note, and made diligent search for the notes in the city, and was unable to find them, or the securities pledged with them. I had the means and came 124 prepared to pay them if I could find them; made inquiry at former office of Mr. Mandle, and among the bankers; could find nothing of Mandle or the paper; it was generally reputed that he had absconded, having disposed of the collaterals. Was also here at the time of maturity of second note, and until Congress adjourned June 22.

Cross-examination:

I did not have much money with me when I came here to take care of the notes. I made arrangements with Mr. Stickney, president of the

Freedman's Bank, to furnish the money and take my checks. I had the money in the bank at Chicago—in the Cook County National Bank.

JOHN S. BALDWIN:

125 In the fall of 1874 I was putting down wooden pavement in this city for Finnegan & Nesdale's, at the corner of Sixth and O streets. They gave me in payment a certificate of the Board of Public Works for $1,603.94. I received the certificate directly from the board January 10, 1874, on an order from Mr. Nesdale. A short time afterwards gave that certificate to Mr. Ballard; have no means of fixing the number of the certificate, but it was the only one of Finnegan & Nesdale's certificates that I received about that time. In January, 1874, I was putting down wooden pavement for the Ballard Pavement Company.

EDWARD L. MARSH:

126 Am one of plaintiffs; was bookkeeper of the Ballard Pavement Company in January, 1874; the company have never had any other bookkeeper or clerk than myself in Washington. Have known Frank Ridlon three years. About the middle of January, 1874, he met me at Willard's Hotel, as I came out from dinner, and showed me a certificate of the Board of Public Works issued to our company and asked if it was all right; told him I could not tell, but presumed it was, as we had used several for material, &c. He said, "The signature is all right, is it?" And I said, "Yes." No one else was present. Never had any other conversation with Ridlon as to genuineness of any of our certificates. Never was present at a conversation
127 between Ballard and Ridlon as to genuineness of any such certificates. Was present about last of January, 1875, when Ridlon asked Ballard about a certificate for $5,000 issued to our company, which Ridlon said had been offered to him, and Ballard told him he had better not buy it.

*Defendant's testimony.*

JOHN C. MULFORD:

Am a clerk at Willard's Hotel. I showed certificate No. 4780 to the plaintiff, Ballard, and he examined and said it was all right. I think this was the day I purchased it. When I handed it to him across the counter, I said, "I have invested in your paper or name." This was in January, 1874.

128 Cross-examination:

I bought the certificate from Frank Ridlon; gave him a check for it. My check-book is destroyed. I do not know whether I have the old checks. I may have transferred some other person's check to Ridlon for the certificate. He was in the market every day, buying thousands of dollars every day. Am not certain that I have any memorandum that will fix date of the purchase from Ridlon. I think it was that evening or the next day I saw Mr. Ballard. It may have been two or three days afterwards. I said, "Mr. Ballard, I have bought some of your paper; I wish you would look at it and see if it is all right. I understand there are counterfeits in the market and would like you
129 to examine this." He looked at it and said it was all right. I guess that was all that was said.

**FRANK RIDLON:**

My home is in Massachusetts, but at present live in Washington; am superintendent for Page & Fletcher, contractors; I purchased a certificate issued by the late board of public works to the plaintiff; could tell the time by referring to my check-books, but it was some time in the spring of '74, it strikes me. The number of the certificate was 4780; the amount was $2,329. I did not call on any person in relation to purchasing it before I purchased. At the time I made the purchase,
130 and in disposing of it to Mulford, I called on Ballard in relation to it. I showed the certificate to Ballard and asked him if it was all right. He examined it closely and said yes; said he thought that was all right; told him I was going to purchase it. He said that was all right as far as he knew. He said he had given certificates for material, and he guessed that was one of them. Then he showed it to his bookkeeper, who took a memorandum of it; and I supposed that if they had discovered that it was not all right, they would have notified me. This occurred in the waiting-room of Willard's Hotel. Then as I had purchased this certificate for Mulford, I told him what Ballard had said. Says I: "Mr. Mulford, there is the certificate; there can-
131 not be any doubt about it, and Mr. Ballard tells me it is all right." I purchase this certificate for Mulford. I bought it for 49 and sold it to him for 50.

Cross-examination:

Our concern bought a good many certificates about that time, and as their agent I had a good deal to do with the business. In buying these certificates we most generally inquired of the payees for the reason that there was liable to be forgeries. It was not the main object in making these inquiries merely to ascertain if the endorsement was genuine; it was to ascertain if there was any difficulty or dispute in regard to it. I knew Mr. Ballard very well and went to him to make sure the cer-
132 tificate was marketable property. I asked him if it was all right, and he said he thought it was all right. He said nothing further, except that he had given some certificates for material, and he thought, perhaps, that was one of them, and then he handed it to his bookkeeper for the purpose of making a memorandum of it. I do not think the clerk heard the conversation between me and Mr. Ballard. I think I asked the clerk in regard to it; do not recollect his reply, if he made any, more than he said he would take a memorandum of it.

Mr. Ballard and his clerk were boarding at Willard's and I saw them as they came out from dinner.

[NOTE.—By consent of counsel this witness was to send to the
133 examiner, Mr. Clephane, a memorandum of the date check, fixing the time of his conversation with Mr. Ballard, to be incorporated in his deposition; but this was not done.]

**GEORGE FOLLANSBEE:**

Bought certificate 457 about January, 1874, of a broker named Starr; pledged that certificate and another as collateral security with A. R. Appleman; Appleman brought it back as not good; then used it as collateral with William H. West, giving him authority to lay it before the board of audit. In the mean time told Peter Campbell he could have it for 62½ cents on the dollar; I refused to guarantee it to any one, as I had guaranteed it once and it came back on me, and did not care to
134 sell it again unless I sold it outright. Told West to let Campbell have the board of audit receipt at any time that he paid for it

at the rate of 62½ cents on the dollar Mr. Campbell accounted to me for the sale of the receipt for the sum of $5,000. I neither sold him the board of audit certificate (which included interest on the auditor's certificate), nor the bonds, because if I had he would have accounted to me for $5,155. The transaction with Campbell was about a month ago (witness testified January 27th, 1875); that was the time when he settled with me. I told him he could have the certificate at that price some two months ago, or more. I agreed to sell for 62½ cents, because it was
necessary for me to get that amount to make me whole. At that
135 time certificates were not worth 62½; afterwards bonds went up
to 67⅝. I did not countermand the order because I did not give
it a thought; there was no time limited for the acceptance of the offer.

**Peter Campbell:**

Am a dealer in stocks, bonds, and District securities; have dealt extensively in board of audit certificates and certificates of the board of public works; have known Follansbee three or four years intimately; some time in September, 1874, Mr. Follansbee asked me to collect for him auditor's certificate No. 457, and to sell it for him, pay his note in
the bank, and account to him for the balance; he told me the
136 board of audit receipt was at the bank in the name of W. H.
West, and that he would leave an order there for me to have
it. I obtained the receipt and received for it from the board of audit their certificate for $5,155, which I converted into bonds, and sold the bonds, took up Mr. Follansbee's note at the bank, and left the balance of the money there, deducting my fair commission for the sale of the bond; I told Mr. Follansbee the next day; he asked me what I charged; I told him $10; he gave me the money and offered me more, but I did not take any more; I realized upon the bonds which I obtained for this certificate probably 67⅝. I set-
tled with Mr. Follansbee at the price previously agreed upon
137 between us, 62½. Afterwards he proposed to pay me a commission,
and did pay me $10 as additional commission, and this is all I
would take.

Samuel L. Wilcox produces from board of audit original documents, copies of which are offered in evidence by consent and are hereunto appended, marked respectively Exhibit A 1, A 2, A 3, A 4, A 5, B 1, B 2, B 3, and B 4.

### Exhibit A 1.

No. 457.]

Office of Auditor,
Board of Public Works,
*Washington, D. C., January* 24, 1874.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co., for work on 5th st. east, bet. East Cap'l & C st. so., amounting to five thousand dollars.

$5,000.00.

(Signed) J. C. LAY, *Auditor.*

(Across the face:) This certificate will be paid in sewer certificates, April 1, 1874.

(S'gn'd) JAMES A. MAGRUDER,
*Treas. Board Public Works.*

(Endorsed on back:) Ballard Pavement Co., per W. W. Ballard.
(Sig'd) Wm. H. West.

138 EXHIBIT A 2.

OFFICE BOARD OF AUDIT,
*Washington, D. C., Sept. 25th,* 1874.

Received from Wm. H. West the following-described certificates of auditor of board of public works, for audit and conversion into certificates to be issued by this board:

| No. | Date. | Ownership claimed by— | Amount. |
|---|---|---|---|
| 457 | Jan'y 24, '74. | Same<br>Claim 724. | 5,000 00 |
| | | Total | $5,000 00 |

(Signed) E. G. CHURCH,
Per WILSON.

(Endorsed on back:)

Deliver the certificate for the within to Citizens' National Bank.

(Signed) WM. H. WEST.

Deliver the within certificate to Peter Campbell, or order.

(Signed) A. R. APPLEMAN, *V. P.*

139 EXHIBIT A 3.

For B. P. Works certificate No. 457, dated Jan'y 24, 1874.

WASHINGTON, D. C., *Dec. 3d,* 1874.

For value received and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby sell, transfer, and assign unconditionally to Peter Campbell, or order, board of audit certificate No. , claim No. 724, dated Aug. 1, 1874, amounting to five thousand dollars & interest, and hereby authorize and empower him to sign and execute all needful quittances or other papers, essential to give this arrangement and order full effect.

Witness.

(Sig'd) WM. H. WEST.

140 EXHIBIT A 4.

WASHINGTON, D. C., *October* 4, 1874.

*District of Columbia to Wm. H. West, Dr., for certificates of auditor of board of public works, described as follows:*

| No. | Date. | To whom issued. | Amount. |
|---|---|---|---|
| 457 | Jan. 24, '74 .. | Ballard Pavement Co<br>Interest, 6 mos. 6 days | $5,000 00<br>155 00 |
| | | Total | $5,155 00 |

Received this 3 day of December, 1874, from the board of audit, their certificates No. 8725 for $5,155.00, in full settlement of the above stated claim.

(Signed) WM. H. WEST,
Per PETER CAMPBELL, *Att'y.*

(On back:)

OFFICE BOARD OF AUDIT, *Washington, October* 14, 1874.

The within claim against the board of public works has been compared with the books of their auditor, and upon examination is found to be correct for $5,000.00.

(Sig'd) J. B. MATLEY.

141 EXHIBIT A 5.

In the supreme court of the District of Columbia.

BALLARD PAVEMENT CO.
*vs.*
M. Mandle, Edward P. Aistrop, Henry D. Dudley, Board of Public Works. By amended bill. National Metropolitan Bank, H. L. Horton & Co. } 3606. Eq. dock., 13.

I, R. J. Meigs, clerk of the supreme court of said District, do hereby certify that the foregoing is a correct list of the parties to the cause above noted, and that said cause was commenced February 25, 1874.

In witness whereof I hereunto set my hand and affix the seal of said court this 3rd of December, 1874.

[SEAL OF THE COURT.] (Signed) R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
*Ass't Clerk.*

142 EXHIBIT B 1.

No. 4780.]

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS,
*Washington, D. C., Dec.* 24, 1873.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co. for work as per schedule amounting to two thousand three hundred and twenty-nine and $\frac{14}{100}$ dollars.

$2,329 $\frac{14}{100}$.

(Signed) J. C. LAY, *Auditor.*

(Endorsed on back:) Ballard Pavement Co., per W. W. Ballard.

143 EXHIBIT B 2.

Class 2, No. .]

OFFICE BOARD OF AUDIT,
*Washington, D. C., Aug. 6th*, 1874.

Received from J. C. Mulford the following-described certificates of auditor of board of public works for audit and conversion into certificates to be issued by this board:

| No. | Date. | Ownership claimed by— | Amount. | |
|---|---|---|---|---|
| 4780 | Dec. 24, '73. | Jno. C. Mulford | 2,329 | 14 |
| 230 | Jan. 13, '74. | " | 2,000 | 00 |
| 231 | " | " | 1,000 | 00 |
| 86 | Jan. 6. '74. | " | 1,000 | 00 |
| 85 | " | " | 1,000 | 00 |
| | | Total | $7,329 | 14 |

(Signed) E. G. CHURCH,
Per BEAMAN.

## EXHIBIT B 3.

For value received I do hereby sell, transfer and assign to Peter Campbell or order, certificate 4780, of Dec. 24, '73, for $2,329\frac{14}{100}$ dol- 144 lars and interest; authorize him to receive the same from the board of audit, and sign & execute all necessary quittances or papers to give this arrangement or sale full effect.

Dec. 10th, 1874.

(Sig'd) J. C. MULFORD.

## EXHIBIT B 4.

WASHINGTON, D. C., *Nov.* 28, 1874.

*District of Columbia to Jno. C. Mulford, dr., for certificates of auditor of Board of Public Works, described as follows:*

| No. | Date. | To whom issued. | Amount. | |
|---|---|---|---|---|
| 4780 | Dec. 14, 1873. | Ballard Pav't Co. | 2,329 | 14 |
| | | Int. to Aug. 1, '74, 7 mo. 6 d's | 83 | 85 |
| | | Total | 2,412 | 99 |

Received this 12th day of December, 1874, from the board of audit, their certificates No. 8753, for $2,412.99 in full settlement of the above-stated claim.

(Signed) JOHN C. MULFORD,
P'r PETER CAMPBELL, *Att'y.*

145 (Endorsed on back:)

OFFICE BOARD OF AUDIT,
*Washington, Dec.* 1, 1874.

The within claim against the board of public works has been compared with the books of their auditor, and upon examination is found to be correct for $2,329.14.

(Signed) J. MATLEY.

Class 2, No. 974.]

OFFICE BOARD OF AUDIT,
*Washington, Aug.* 6, 1874.

*Certificates issued by auditor of board of public works.*

| | |
|---|---|
| 4780, 1873 | $2,329 14 |
| Int. | 83 85 |
| | $2,412 99 |

From claim 272.
Ownership claimed by Jno. C. Mulford.
Claim presented by .
8753.

146 *Decree in gen'l term.—Filed Mar. 4, 1876.*

In the supreme court of the District of Columbia, in general term.

WILLIAM W. BALLARD, TALLMADGE E. BROWN and Edward L. Marsh, trading under the firm name and style of The Ballard Pavement Company,
*vs.*
MICHAEL MANDLE, EDWARD P. AISTROP, Henry H. Dudley, John C. Mulford, Peter Campbell, George Follansbee, Francis H. Morgan and The Middletown National Bank, et al.
No. 3606. Eq. doc., 13.

This cause coming on to be heard in the general term in the first instance upon the pleadings and proofs and the decrees pro confesso
147 against the defendants Michael Mandle, Edward P. Aistrop and Henry H. Dudley, and having been argued by the counsel for the complainant, and the counsel for the defendants, John C. Mulford, Peter Campbell, George Follansbee and Francis H. Morgan, upon consideration thereof it is, this 4th day of March, 1876, adjudged, ordered and decreed as to the said defendants John C. Mulford and Peter Campbell that the bill be dismissed; as to the defendant, George Follansbee, that the plaintiffs are entitled to recover from him the highest market value since the 16th day of February, 1875, of three-sixty-five bonds of the District of Columbia, of the par value of five thousand one hundred and fifty dollars ($5,150$\frac{00}{100}$), with interest coupons all attached,
148 less the sum of two thousand dollars ($2,000) and interest thereon from the 26th day of January, 1874, to such day of highest market value; as to the defendant, Francis H. Morgan, that the plaintiffs are entitled to recover from him the highest market value at any time since the 8th day of December, 1874, of such bonds of the par value of sixteen hundred and fifty dollars ($1,650), with interest coupons all attached, less the sum of six hundred and forty-one $\frac{58}{100}$ dollars ($641.58), with interest thereon from the 17th day of January, 1874, to such day of highest value; and as to the defendant, The Middletown National Bank of Middletown, New York, that the plaintiff is entitled to recover from it the highest market value of such bonds at any time since the 8th day of December, 1874, of the par value of twelve hundred and
149 fifty dollars ($1,250) with interest coupons all attached, less the sum of four hundred and eighty-one $\frac{80}{100}$ dollars ($481$\frac{80}{100}$), and interest thereon from the 26th day of January, 1874, to such day of highest value.

And it is further ordered, adjudged, and decreed that when the respective amounts due to the complainants from the three last named defendants shall have been ascertained by the court in special term, the complainants shall have execution as at law against them for such respective amounts, with interest thereon from such respective days of highest market value.

And it is further ordered that this case be remanded to the court in special term for further proceedings in conformity to this decree.

By the court.

A. WYLIE.

MARCH 4, 1876.

150 *Appeal to Sup. C't U. S.*

In the supreme court of the District of Columbia.

BALLARD ET AL.
*vs.* } No. 3606. Eq. doc. 13.
MANDLE ET AL.

The defendant George Follansbee, by his solicitor, enters an appeal to the Supreme Court of the United States from the decree in this cause of the 4th of March, 1876.

JOHN E. NORRIS, *Sol'r.*

Appeal entered as directed.
By the court.

*Citation.*

DISTRICT OF COLUMBIA, *to wit:*

To John C. Mulford:

You are hereby cited and admonished to be and appear at a Supreme
Court of the United States to be holden at Washington on the
151 second Monday of October next, pursuant to an appeal filed in
the clerk's office of the supreme court of the District of Columbia,
wherein William W. Ballard et al. is plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

Test:

R. J. MEIGS, *Cl'k,*
By R. J. MEIGS, JR., *Ass't C'k.*

WILLIAM A. COOK,
*Sol'r for Def't Mulford.*

152 *Appeal bond.—Filed Mar. 11, 1876.*

In the supreme court of the District of Columbia, the 11th day of March, 1876.

GEORGE FOLLANSBEE
*vs.* } No. 3606. Equity. On appeal.
WILLIAM W. MANDLE ET AL., BALLARD PAVING Company.

Know all men by these presents that we, George Follansbee, are bound unto the above-named Ballard Paving Company in the sum of six thousand dollars, to be paid to the said Ballard Paving Company, its executors or administrators. To which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this eleventh day of March,
1876.

153 Whereas the above named George Follansbee hath prosecuted
a writ of appeal to the Supreme Court of the United States to

reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named George Follansbee shall prosecute his said writ of appeal to effect, and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. FOLLANSBEE. [SEAL.]
R. C. HEWETT. [SEAL.]

Sealed and delivered in presence of—
FRANK T. HOWE.
ABNER Y. LAKENAN.

The foregoing bond is hereby approved.

D. K. CARTTER,
*Ch'f Just.*

154 *Appeal of compl'ts.*

In the supreme court of the District of Columbia.

WILLIAM W. BALLARD ET AL.
*vs.*
MICHAEL MANDLE ET AL.
No. 3606. Eq. doc., 13.

The complainants by their solicitors enter an appeal to the Supreme Court of the United States from so much of the decree made in this case by the court in general term on the 4th day of March, 1876, as dismisses the bill of complaint as against the defendants John C. Mulford and Peter Campbell.

STANTON & WORTHINGTON,
*Solicitors for Complainants.*

Appeal entered as directed.
By the clerk.

155 *Bond of compl't to S. C. U. S.—Filed May* 3, 1876.

In the supreme court of the District of Columbia, the day of , 1876.

WILLIAM W. BALLARD ET AL.
*vs.*
MICHAEL MANDLE, PETER CAMPBELL, JOHN C. Mulford, et al.
No. 3606. Eq. doc., 13.

Know all men by these presents that we, William W. Ballard, Tallmadge E. Brown, and Edward L. Marsh, and John O. Evans are bound unto the above-named John C. Mulford in the sum of five hundred dollars, to be paid to the said John C. Mulford, his executor or administrators. To which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed
156 with our seals and dated this 31st day of March, 1876.

Whereas the above-named William W. Ballard, Tallmadge E. Brown, and Edward L. Marsh hath prosecuted an appeal to the Supreme

Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named William W. Ballard, Tallmadge E. Brown, and Edward L. Marsh shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WILLIAM W. BALLARD. [SEAL.]
TALLMADGE E. BROWN. [SEAL.]
EDWARD L. MARSH. [SEAL.]
JOHN O. EVANS. [SEAL.]

157 Sealed and delivered in presence of—
E. JONES, as to W. W. Ballard.
JOHN A. FLEET, to Brown.
E. JONES, as to E. L. Marsh.
WILLIAM SMITH, as to J. O. Evans.

Approved:

A. WYLIE,
*Justice, &c.*

In the supreme court of the District of Columbia.

WILLIAM W. BALLARD ET AL. *vs.* MICHAEL MANDLE ET AL. } No. 3606. Equity docket, 13.

It is hereby stipulated that the foregoing is all of the record in this case essential to the determination of the appeals taken to the Supreme Court of the United States, and that upon the foregoing record the case may be heard in that court.

A. S. WORTHINGTON,
*Of Counsel for Complainants.*
JOHN E. NORRIS,
*Of Counsel for G. Follensbee.*
WILLIAM A. COOK,
*Sol'r for J. C. Mulford and P. Campbell.*

158 DISTRICT OF COLUMBIA, *to wit:*

I, R. J. Meigs, clerk of the supreme court of said District, do hereby certify that the annexed writings are truly copied from the originals on file and of record in said court, and constitute the record in the cause mentioned in the caption thereof, stipulated by the parties to be used upon its hearing before the Supreme Court of the United States.

Witness my hand and the seal of said supreme court of D. C. this 29th of January, 1877.

[SEAL.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
*Assistant Clerk.*

(Indorsement on cover:) No. 329. George Follansbee, appellant, vs. The Ballard Paving Company, composed of W. H. Ballard, T. E. Brown, & E. L. Marsh. District of Columbia sup. court. Filed 29th January, 1877. And No. 715. The Ballard Paving Company et al., appellant, vs. John C. Mulford et al. Filed 6 July, 1878.

○

# Supreme Court United States.

OCTOBER TERM, 1879.

**CROSS-APPEALS.**

GEORGE FOLLANSBEE, Appellant,

*vs.*

THE BALLARD PAVEMENT COMPANY. No. 102.

THE BALLARD PAVEMENT CO., Appellant,

*vs*

JOHN C. MULFORD and PETER CAMPBELL. No. 441.

## BRIEF FOR THE BALLARD PAVEMENT COMPANY.

**A. S. WORTHINGTON,**
*Solicitor for Ballard Pavement Company.*

*Thomas McGill & Co., Law Printers, Washington, D. C.*

# Supreme Court of the United States.

OCTOBER TERM, 1879.

GEORGE FOLLANSBEE, Appellant,
*vs.*
THE BALLARD PAVEMENT COMPANY. No. 102.

THE BALLARD PAVEMENT COMPANY, Appellant,
*vs.*
JOHN C. MULFORD and PETER CAMPBELL. No. 441.

Cross-appeals.

*Brief for the Ballard Pavement Company.*

## Statement of the Case.

The Board of Public Works of the District of Columbia, created by act of Congress of 21st of February, 1871, (16 Stats., p. 426,) not having the means to pay all the demands of contractors and others against it, issued to the creditors of the District a number of certificates of indebtedness, in the following form:

> "Office of Auditor Board of Public Works,
> Washington, D. C
>
> I hereby certify that I have this day audited and allowed the account of      for      , amounting to      dollars.
>
> —— ———,
> *Auditor.*"

On the 20th of June, 1874, Congress abolished the Board of Public Works and created a Board of Audit, which it authorized to examine and audit for settlement the debt *purporting* to be evidenced and ascertained by certificates of the Auditor of the Board of Public Works, (18 Stats., part 3, pp. 118, 119,) and to issue its own certificates in lieu thereof. By the same act the Commissioners of the Sinking Fund of the District were authorized to give in exchange for such certificates of the Board of Audit 3.65 bonds of the District payable to bearer. (Id., p. 120.)

The complainants below composed the firm of the Ballard Pavement Company. That company, for work done by it for the Board of Public Works, received a number of its certificates of indebtedness. Some of these, indorsed in blank in the firm name, they delivered to one Mandel, or his agents, Aistrop & Dudley, from whom they received forty per cent. of the par or face value of the certificates as a loan. At the same time they gave Mandel two promissory notes of the firm at three and four months for the amount so borrowed, and delivered to him or his agents the certificates in question as collateral security for the payment of their notes, and took from him receipts showing the precise nature of the transaction. (See Exhibits W. W. B. 1 and W. W. B. 2, Record, pp. 30, 31.)

Before either of the notes matured Mandel fraudulently disposed of, to third persons, the certificates which he so held as collateral. Learning this, the complainants filed their bill against Mandel and his agents and the Board of Public Works, averring the above facts, setting forth that they could not state the names of the persons into whose hands the certificates had gone, and praying that the Board of Public Works might be enjoined, pending the suit, from taking up the certificates; that Mandel should be required to bring the notes into court; that the holders of the certificates when found should be required to bring them into court; that the complainants, upon paying into court the amount of the notes at maturity, might have both the notes and the certificates delivered to them, and general relief. (Record, pp. 1–3.)

Mandel had absconded. Notice to appear was given him by publication. His agents, Aistrop and Dudley, and the members of the Board of Public Works, were personally served. None of the parties made defense, and decrees *pro confesso* were duly entered up against them. (Record, pp. 6, 25.)

When the Board of Audit was formed all the certificates in question found their way to that Board, being presented by the holders for conversion into Board-of-Audit certificates and so into 3.65 bonds. Obtaining the names of the holders from the Board of Audit from time to time, the complainants, by leave of the court, filed several supplemental bills, making the Board of Audit, the commissioners of the sinking-fund, and the persons who had presented the certificates parties defendant. (Record, pp. 7, 18.)

Among the defendants so brought in were George Follansbee, the appellant in case No. 102, and Peter Campbell and John C. Mulford, the appellees in case No. 441. As to all the certificates, a preliminary injunction was granted. (Record, p. 11.)

*As to Follansbee and Campbell,* the supplemental bill in which they are mentioned (Record, p. 18, par. 4) charges that Follansbee held certificate No. 457 for $5,000, and that through Campbell, pending the suit and with notice of the injunction, he converted it into a Board-of-Audit certificate, and then into 3.65 bonds, and then into cash, receiving altogether $3,486, Campbell keeping $361 and paying over the rest to Follansbee. And the complainants prayed that Follansbee and Campbell might be compelled to make restitution in such proportions as the court might direct, and general relief.

*As to Mulford,* the supplemental bill in which he is named (Record, pp. 7–9) charged that he had presented to the

Board of Audit certificate No. 4,780, (for $2,329.14,) and prayed that he might be enjoined, pending the suit, from receiving a Board-of-Audit certificate in exchange for it. He was so enjoined, (Record, p. 11,) but, nevertheless, through Peter Campbell, he converted the certificate, and obtained for it 3.65 bonds of the par value of $2,400. Upon a rule to show cause why he should not be attached for contempt being issued, (p. 15,) he admitted this fact, but pleaded ignorance, and was allowed to deposit the bonds in court. (P. 17.)

Follansbee and Campbell both answered the bill. Follansbee (Record, pp. 20, 21) claimed to have sold the certificate 457 for $5,000 to Campbell for 62½ cents on the dollar, and that the latter obtained the proceeds from the District; while Campbell averred (p. 23) that he acted as a broker for Follansbee and retained the excess over 62½ cents on the dollar (amounting to $361) as compensation for his services.

Mulford also answered. (Record, p. 26.) He claimed to have been advised by Mr. Ballard, the principal complainant, through one Ridlon, that the certificate 4780 was "all right" before he purchased it, and set up this as an estoppel. All the defendants further set up as a defense that they were purchasers of these certificates in good faith and without notice of the equity of the complainants.

The plaintiffs duly joined issue upon the answers of Follansbee, Campbell, and Mulford, (pp. 24, 27,) and evidence was taken by both sides. The only evidence as to Follansbee and Campbell's dealings with certificate 457 is their own statements. (Record, pp. 35, 40.) The evidence as to the alleged estoppel pleaded by Mulford, is his statement (p. 34) and Ridlon's (p. 35) in support of it, and Ballard's (p. 30) and Marsh's (p. 34) against it. There was no evidence that any of the defendants had any notice of the equity of the complainants when they purchased.

The cause was heard in the General Term in the first instance, and resulted in a decree against Follansbee and several other defendants, and in a dismissal of the bill as to Campbell, on the ground that he acted as a broker, and as to Mulford, on the ground that the alleged estoppel was proved.

Of the defendants, Follansbee alone appealed. The complainants appealed from so much of the decree as dismissed the bill as to Campbell and Mulford.

## Assignment of Errors.

I. The court below erred in dismissing the bill as to the defendant Campbell on the ground that he acted as a broker for Follansbee in converting certificate 457 into 3.65 bonds.

II. It erred again in dismissing the bill as to the defendant Mulford on the ground that as to him the complainants were estopped to claim the certificate 4780.

## Argument.

1. *As to the jurisdiction of this court.*

A motion to dismiss Follansbee's appeal, on the ground that the amount involved does not give this court jurisdiction, has been heretofore submitted, and affidavits and a brief in support of it, and they are now merely referred to and made part of this brief.

If that motion be granted, the appeal in case No. 441 will stand alone, and the question of jurisdiction there can be disposed of when the case is reached or a motion is made to dismiss that appeal.

It is conceded, that, taking both appeals together, the amount involved is over $2,500.

2. *As to the dismissal of the bill in respect of the defendant Campbell.*

In his answer (p. 23) and in his testimony (p. 36) Campbell admits that he procured from the Board of Audit their certificate No. 8,725 for $5,155, which was issued in lieu of certificate 457, and that *he* converted that certificate (8,725) into 3.65 bonds of the par value of $5,150, and sold the bonds for $3,486. He must therefore account to the complainants for those proceeds of their claim, unless he can show to the satisfaction of the court that he acted as broker for another.

On that question there is simply a question of veracity between him and Follansbee. The latter, in his answer (p. 21) and in his testimony (pp. 35, 36,) distinctly states that he made an absolute and unconditional sale of certificate 457 to Campbell for 62½ cents on the dollar. And in this he is corroborated by the fact, admitted by Campbell, that Campbell paid to him only 62½ per cent. of the face value of certificate 457 for $5,000, (amounting to $3,125,) while the added interest, $155, included in the Board-of-Audit certificate, was wholly retained by Campbell.

3. *As to the dismissal of the bill in respect of the defendant Mulford.*

The court below in its opinion (2 McArthur, p. 361) disposes of this matter in a word by saying: "Mulford purchased after inquiries had been made of Ballard, who assured him that the certificate was all right. We think the complainants are now estopped from denying his title."

In point of fact, Mulford admits in the third paragraph of his answer (p. 26) and in his testimony (p. 34) that *his* conversation with Ballard occurred *after* he had purchased certificate 4,780. And in his testimony he further admits that in presenting the certificate to Ballard he called his attention especially to the question of the genuineness of the signature, and that it was in reply to that suggestion that Ballard said it was "all right." Ballard himself testifies positively (p. 30) that Mulford merely told him he had purchased one of his certificates, and did not show it to him at all. There is no other witness as to this conversation. As to the conversation with Ridlon, the latter testifies (p. 35) that he purchased the certificate *for Mulford*, and that *after* he purchased it he showed it to Ballard, who said "he thought it was all right"; that it was "all right as far as he knew"; that he had given certificates for material and "guessed that was one of them," or "thought perhaps that was one of them."

And Ridlon admits (p. 35) that instead of communicating these non-committal expressions to his principal, Mulford, he said to him, "*Mr. Ballard tells me that it* [the certificate] *is all right.*"

Ballard says (p. 30) that Ridlon merely asked him if the signature on the back of the certificate was genuine, and that he told him it was. And in this he is corroborated by his book-keeper, Marsh, (p. 34,) who says that about the same time and place Ridlon asked him the same question as to one of the Ballard Pavement Company's certificates.

Mr. Ballard testifies further (p. 30) that when those conversations with Ridlon and Mulford occurred he had no knowledge or suspicion that Mandel had parted with the certificates placed in his hands. The transaction with Mandel occurred January 13, 1874, (see Exhibit W. W. B. No. 3, Record, p. 31,) and Ridlon, Mulford, and Ballard agree that the conversations in question occurred that same month. The bill in this case was filed February 25, 1874.

The claim of estoppel, therefore, fails—

First. Because all the conversations occurred after Mulford, through Ridlon, had bought the certificate.

Second. Because on Mulford's own showing all that Ballard said to Ridlon was that he *thought* the certificate was "all right," which was perfectly true. And

Third. Because the burden of proof is upon Mulford, and the evidence is, to say the least, evenly balanced as to whether Ballard said anything more than that the signature was all right, which was also true.

III. *As to the main question* involved in both appeals, *whether the purchasers of the choses in action represented by these certificates took them subject to equities between Mandel and the Ballard Pavement Company, of which they are not shown to have had notice.*

For the Ballard Pavement Company, it is maintained—

1. That the purchaser of a chose in action takes only an equitable title, and that every equitable title is subject to equities between antecedent parties, whether the purchaser has notice or not.

See Vattier *v.* Hinde, 7 Peters, 271; Mangles *v.* Dixon, 3 H. L. Cas., 702; Chew *v.* Barnett, 12 S. & R., 389; Davis *v.* Austen, 1 Ves., Jr., 248; Swan *v.* North British Australian Co., 7 Hurl. & Nor. R., 603, affirmed on appeal, Law Journal, 1863, N. S., vol. 32, Trinity Term, May 15; and an excellent review of the authorities by Mr. Justice Wylie in this case, reported in Vol. 1, No. 50, (Dec. 22, 1874,) of the Washington Law Reporter.

This rule was applied in McNeal *v.* Tenth National Bank, 55 Barb., 59, to the assignee of the pledgee of stock certificates accompanied by a power of attorney in blank, reversed in 46 New York, 325, on the express ground that the legal title had passed; in Bush *v.* Lathrop, 22 N. Y., 535, to the second assignee of a bond and mortgage; in Boardman *v.* Hayne, 29 Iowa, 339, to the assignee of an order given on a township treasurer; Chew *v.* Barnet, 11 S. & R., 389, to the purchaser of an equitable title in real estate; in Birkhead *v.* Brown, 5 Hill, 646, to letters of credit; in Mechanic's Bank *v.* R. R. Co., 13 N. Y., 630, 631, to shares of stock; in Yingling *v.* Kohlhan, 18 Md., 148, to a lost note not shown to have been payable to bearer or to order; in Birchback *v.* Wilkins, 22 Pa. St., 26, to a sealed note; in Williamson *v.* Thompson, 16 Vesey, Jr., 443, to a certificate of deposit and a "navy bill"; in Glyn *v.* Baker, 13 East., 509, to India bonds; in *In re* European Bank, 5 L. R. Ch. Ap., 358, to an overdue bill of exchange; in Covill *v.* Tradesmen's Bank, 1 Paige, 130, to a sealed note; in Cutts *v.* Guild, 57 N. Y., 229, to the assignee of a judgment; in Andrews *v.* Pond, 13 Peters, 79, to a bill of exchange protested for non-acceptance; and in Baldwin *v.* Ely, 9 How., 599, to a certificate of indebtedness assignable by law.

2. That the only exceptions to the rule that the purchaser of a chose in action takes merely an equitable title, subject to all prior equities, is in the case of *negotiable* instruments. That the only negotiable instruments known to our law are promissory notes, bills of exchange, bank notes, checks and bonds payable to bearer; and that these are excepted because they are expressly made payable to the order of the payee or drawee, or to bearer. Without such words they are not negotiable. (1 Am. Lead. Cases, 5th ed., 323–325, and cases there cited; Williamson *v.* Thompson, 16 Ves., 443; Glyn *v.* Baker, 13 East., 509.)

3. That the doctrine of estoppel has no application to the case.

Both the certificates, 457 and 4780, showed on their face that they were issued originally to the Ballard Pavement Company. (See copies of them, pp. 36 and 38 of the Record.) Buying them from other persons, Follansbee and Mulford are presumed to have known the law. If the law be that they could purchase from third persons without inquiry only at their peril, they cannot say that they were misled by the indorsement, which conveyed only an equitable title. If the law be that Mandel or his assignees could pass a title clear of antecedent equities, then Follansbee is safe without recourse to the doctrine of estoppel. Again, if the law be that the assignee of a chose in action evidenced by a mere certificate of indebtedness can pass no better title than his own, the complainants had a right to rely upon that law when they transferred these certificates to Mandel; and if the law be otherwise, no estoppel is necessary to close their mouths.

The reasoning of counsel for Follansbee as to estoppel goes too far. It proves—if it prove anything—that the District was estopped to deny that it owed to complainants the amount mentioned in the receipts. It proves that every person who places in the hands of another written evidence of any kind that he owes that person money, is afterwards estopped to deny as to third persons—assignees—that he does owe that money. It proves that the purchaser of an overdue promissory note has as good a standing in court as he who purchases it before maturity. In short, it destroys the distinction between negotiable and non-negotiable paper, and makes commercial paper of all choses in action evidenced by writing.

4. That proof of a local custom in contravention of the law is not admissible. On this point we rely upon Barnard *v.* Kellogg, 10 Wall., 391; Thompson *v.* Riggs, 5 Wall., 679; and especially Vermilye & Co. *v.* Adams Express Co., 21 Wall., 138. The other authorities to the same effect are collected in the note to Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, part 2, ed. of 1872, p. 904, *et seq.*

5. That if such evidence be admissible, there is none in this case tending to prove a custom that the purchasers of these certificates took them free of equities between prior holders. It does not follow, that because certain securities are common "articles of traffic," that an assignee of them takes any better title than his assignor. (Smith's Leading Cases, ed. of 1872, pp. 814, 815, and cases there cited.)

In the present case, the moment the question of negotiability arose, through Mandel's operations, the injured parties rushed into court, and the court held that these certificates were non-negotiable. So Follansbee admits that this very certificate 457 had been sold by him before he sold it to Campbell, and that the purchaser brought it back as not good, and he thereupon redeemed it, *and thereafter refused to guarantee it.* And Ridlon, who was buying thousands of dollars' worth every day, (Mulford, p. 34,) says: "In buying these certificates, *we most generally inquired of the payees . . . to ascertain if there was any difficulty or dispute.*"

6. That the measure of damages as fixed by the court below not having been objected to here, will not be disturbed by this court. (Talty *v.* Freedmen's Bank, 93 U. S., 326.)

A. S. Worthington,
*Solicitor for Ballard Pavement Co.*

# Supreme Court of the United States.

GEORGE FOLLANSBEE, APPELLANT,
*v.*
THE BALLARD PAVING COMPANY.
*No.* 102.

*Motion by Appellee to Dismiss Appeal.*

## BRIEF OF APPELLANT.

(1.)

The complainants filed an original and several supplemental bills, by which they endeavored to obtain a number of certificates, or their value, issued by the late Board of Public Works.

(2.)

The motion to dismiss is based on the assumption "that "the amount involved is less than twenty-five hundred "dollars."

As will be seen by reference to the record, (pp. 1, 7, 18,) the complainant saw fit to file a single bill and supplemental bills against a number of persons, among them Peter Campbell, John C. Mulford, and George Follansbee. The decree (Record, p. 40) embraced these three and others.

The decree was in favor of Campbell and Mulford. Mulford held a certificate for $2,329.14. (Record, p. 26.) The bill was dismissed as respects Mulford and Campbell, and the complainant appealed.

Record, p. 42, (No. 441.)

Without dismissing this appeal the complainant below attempts to have the appeal of Follansbee dismissed. The decree following the bill was single. The "amount in "dispute," as embraced in the decree and on appeal in this court by Follansbee, (No. 102,) and the complainant against Mulford, (No. 441,) exceeds $2,500.

Can the "amounts in dispute," embraced in the decree below, be "cut up?" or can the appeals from the same decree be separated, in order to deprive this court of jurisdiction? The union of the parties was the act of the Ballard Paving Co. It now seeks to sever them.

(3.)

But however this may be, the mode of determining the amount involved is inadmissible.

The decree was conditional, and expressly provided that the case should, as respects Follansbee, (and two others,) "*be remanded to the court in special term for further proceedings,*" *viz., to ascertain the highest market value of the* "*three-sixty-five-bonds*" of the District of Columbia. And only when this should be done was the complainant to have execution.

But it never was done. Appeals were taken without the required action of the court below in special term.

(4.)

And it is now attempted to substitute for the require-ment of the court below—for regular judicial action—the *ex parte* statements or affidavits procured by the Ballard Paving Company, appellee, and filed with the motion to dismiss.

In effect, it is an attempt to make an addition to the record by affidavits taken without notice, and in this method have the appeal dismissed. Can this be done?

Sample *v.* Hagan, 4 Wal., 431.
Hudgkins *v.* Kemp, 18 How., 530.

(5.)

The correctness of the affidavits is not conceded. They differ. One fixes the value of the bonds at 75 cents on the dollar; the other at 80 cents. Other affidavits would be different from these.

(6.)

It may be doubted whether the cases are properly before the court, but not for the reason assigned in the motion.

It is certain no definite sum was embraced in the decree.

To fix the amount due from Follansbee, (and others,) a reference was decreed to the special term. This required evidence, notice, examination, determination.

Until this order was carried out could there be an appeal? And would not the proper action be a dismissal of the appeal for "further" proceeding below?

On this point two cases may be cited:

Montgomery *et al. v.* Anderson *et al.*, 21 How., p. 386.
Mordecai *et al. v.* Lindsay *et al.*, 19 How., p. 199.

In this manner the question of jurisdiction as to amount can be regularly and properly ascertained.

WILLIAM A. COOK,
*Sol. for Follansbee et al.*

# Supreme Court of the United States.

October Term, 1879.

George Follansbee, *Appellant*,
*vs.*
The Ballard Pavement Co., *Appellee*.
No. 102.

The Ballard Pavement Co., *Appellants*,
*vs.*
John C. Mulford and others, *Appellees*.
No. 441.

N. A. Cowdry, *Appellant*,
*vs.*
J. B. Vandenbergh and others, *Appellees*.
No. 1075.

N. A. Cowdry, *Appellant*,
*vs.*
J. B. Vandenbergh et al., *Appellees*.
No. 1076.

## BRIEF OF APPELLANTS.

JOS. H. BRADLEY,
*Solicitor for N. A. Cowdrey.*
WILLIAM A. COOK,
*Solicitor for George Follansbee*
*and John C. Mulford.*

R. O. Polkinhorn, Printer, 632 and 634 D Street, N. W.

# Supreme Court of the United States.

## October Term, 1879.

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| GEORGE FOLLANSBEE, *Appellant,*<br>*vs.*<br>THE BALLARD PAVEMENT CO., *Appellee.* | No. 102. |
| THE BALLARD PAVEMENT CO., *Appellants,*<br>*vs.*<br>JOHN C. MULFORD and others, *Appellees.* | No. 441. |
| N. A. COWDRY, *Appellant,*<br>*vs.*<br>J. B. VANDENBERGH and others, *Appellees.* | No. 1075. |
| N. A. COWDRY, *Appellant,*<br>*vs.*<br>J. B. VANDENBERGH et al., *Appellees.* | No. 1076. |

## Brief of Appellants in the foregoing cause.

Cases marked No. 102 and No. 441, in the foregoing list, are cross-appeals in the same cause. Cases marked No. 1,075 and 1,076, are separate causes. They are all appeals from decrees of the Supreme Court of the District of Columbia.

The causes originate in contracts made by The Ballard Pavement Company and Vandenburgh & Co., respectively, with the Board of Public Works of the District of Columbia, for grading, paving, and improving certain streets, &c., in the City of Washington.

It is a matter of history, fully shown by the proceedings in, and the legislation of, Congress, that when the District of Columbia was created, in 1871, a corporation with a local legislature, very large powers over the avenues, streets, and all thoroughfares and sewers, were given to a quasi corporation created by the act, called The Board of Public Works. That board set to work to grade, pave, and improve a large number of the streets and avenues, and to create a system of sewerage in the City of Washington, and made contracts for those purposes, involving a vast outlay of money. The ordinary resources of the city were wholly insufficient to meet the cost involved in these works, and they imposed special taxes on the private property in front of which these improvements were made. But it was impossible, by this means, to get in money sufficient to meet one-half of these contracts as the work progressed and was completed. As a mode of relief, they empowered the auditor of the Board of Public Works to ascertain the value of the work done and to issue certificates therefor to the contractors, in the form set out in the pleadings. (Record, p. 102.)

It is doubtful whether the full amount of those certificates has been ascertained to this day, but it is certain they amount to several millions of dollars.

Cowdrey, in his answer, which is substantially responsive to the charges in the bills No. 1,075 and 1,076, says: "That said Hartley and this defendant were on a casual visit to the City of Washington, District of Columbia; that said certificates of the Board of Public Works and similar ones were offered for sale to them (the said Hartley and this defendant) by brokers and dealers, and they were solicited to purchase the same. They made full inquiries, and learned that said certificates, representing audited debts against the District of Columbia, which, when endorsed by the payees therein named, passed from hand to hand in the market as merchantable and transferrable property, and that the value of said certificates was duly quoted at the

Stock Exchange of the City of Washington, and that the holder of them, on presentation of said certificates at the proper department of the government of the District of Columbia or Board of Public Works, for settlement, was recognized as the owner, and received from the District of Columbia the amount due thereon. That the amount of similar certificates issued by the said Board of Public Works was large, defendant thinks, about $7,000,000; and that there was a large traffic or trade in said certificates, the same passing from hand to hand by delivery, when endorsed by the payee; that the trade and traffic was not confined to Washington, but was carried on in other cities, viz: Baltimore, Richmond, Philadelphia, Newark, Jersey City, and the City of New York, and other places, to the defendant unknown; that said facts had been known and said trade in said certificates had been carried on for a long time previous to the purchase of the same being made by this defendant, the defendant thinks, for years; all of which was well known and participated in by plaintiffs in this cause and by many brokers, bankers, merchants, and others having money to invest or to use temporarily; that under these circumstances, this defendant and said Hartley purchased said certificates, Nos. 390 and 4,351, from a well known and responsible business man in the City of Washington, viz: Mr. L. J. Crounse, * * * ; that at the time they purchased many thousand dollars of similar certificates in addition to said Nos. 390 and 4,351."

By an act of Congress, 18 vol. Stat., p. 118, 119, a Board of Audit, consisting of the First and Second Comptrollers of the U. S. Treasury, was created to audit, among other things, the certificates thus issued, and to issue their certificate of the indebtedness found by them, which was to be countersigned by the Comptroller of the District, and thereupon, on presentation thereof, the amount thus certified was paid by the Treasurer of the District of Columbia.

The pleadings and evidence in these three cases fully sustain this statement of the facts, so far as they relate to the three cases in common. In Cowdrey's case, the 15th paragraph of the bill sets out in detail the duties of the Board of Audit touching these certificates of the Board of Public Works, and, among other things, they were required to make a tabular and detailed statement thereof, as the *same may be presented to them, and of the persons owning the same*, and the amount found to be due thereon, and to issue to the owner, or *just and legal claimant*, a certificate, signed by each of the members of the said Board, stating the amount found due to such owner or claimant. The complainant, in this case, put in evidence a paper writing purporting to be a letter without date, addressed to the Board of Audit, and signed by complainants, but without any proof in regard to it—as to the handwriting, or whether it was ever sent by them or received by the Board of Audit, and this to show that they *claimed* the certificates before the Board of Audit.

Paragraph 17 further presents the course of business as to the certificates of both classes, viz: those of the Board of Public Works and those of the Board of Audit; and paragraph 19 charges that complainants have reason to believe that their certificates, named in the bill, have been, or are about to be, presented to the Board of Audit, and it is the purpose and design of the said Board of Audit to examine and audit said certificates in *favor of the person or persons who have presented, or who may present the same* to the said Board without reference or regard to the true ownership thereof, or consideration of plaintiffs' right and claim thereto." This bill was sworn to Oct. 19, 1874. Cowdrey, in his answers, says he has not seen the certificates since 16th July, 1874, when he presented them to the Board of Audit.

And so as to the case of the Ballard Paving Company. In he 9th paragraph of the bill (p. 3), it is charged that "it is the intention of the *holders of said* certificates to present them to the said Board" [of Audit] "and obtain payment thereof, either in money or bonds payable to bearer, without regard to the rights of the plaintiffs; and that said Board will pay said certificates on presentation thereof, or give in exchange for them bonds," &c.; and in their supplemental bill (p. 8), par. 2, they enumerate as holders of said certificates residing out of the District, John C. Mulford, of *Salem, New Jersey;* the First National Bank, of *New York;* Middletown National Bank, *State of New York;* and two persons whose residence is unknown, besides persons residing in the city of Washington, showing how widely they were distributed; and so in paragraph 4, stating what the Board of Audit had done; and so in paragraph 5 (p. 8 and 9), what the Board of Audit intended to do, and how the certificates, when indorsed and delivered by the payees, were treated by the accounting officers authorized by law to settle and pay them. And this is further shown by the amended and supplemental bill, p. 18, par. 1, 2, 3, and 4. And in the answer of Geo. Follansbee, p. 21, he says he "purchased it [the certificate] at a fair valuation, without any knowledge or intimation of any claim or asserted right of any other person, just as he was in the habit of buying paper or securities *put upon the money market.*" And the answer of Peter Campbell, p. 23, bottom paragraph, as to the *market value* of the certificates; and of Mulford, p. 26, 3d par., that he *purchased for its full market value.*

The evidence is equally decisive as the pleadings. Ballard, one of complainants, p. 29, near bottom, certificate 147, issued to John Baldwin, who passed it over to complainants, p. 30, (114 margin), Mulford said to him, "I have got your name in the safe," and Ballard said, "I understood he had *bought* one of our certificates, but did not know what one." Frank Ridlow, p. 35:

"I showed the certificate to Ballard, and asked him if it was all right. He examined it closely and said 'yes;' said he thought that was all right, as far as he knew; told him I was going to purchase it. He said that was all right. He said he had given certificates for material and he guessed that was one of them." (This was the certificate purchased by Mulford, and the bill was dismissed as to him.) Again, same page: "Our concern bought a good many certificates about that time, and as their agent, I had a good deal to do with the business. In buying these certificates, we most generally enquired of the payees;" * * "the main object in making these enquiries was to ascertain if the *endorsement was genuine*;" * * "I knew Mr. Ballard very well, and went to him to make sure the certificate was *marketable* property." Geo. Follansbee, p. 36: "At that time, certificates were not worth 62½ cents; afterwards, the bonds went up to 67⅝." Peter Campbell, p. 36: "I am a dealer in stocks, bonds, and district securities; have dealt extensively in Board of Audit Certificates and Certificates of Board of Public Works." And all this **is** corroborated by the evidence of the forms of proceeding and the requisite orders, on pp. 36, 37, 38, and 39.

We therefore assume, on the pleadings and evidence in these causes—

1. The Board of Public Works had lawful authority to issue, through its auditor, certificates of indebtedness for sums of money due under contracts with the Board of Public Works.

2. That the Board of Audit had power to revise the certificates thus given and to issue their certificates in lieu thereof.

3. That the Comptroller of the District of Columbia had power to countersign the certificates of the Board of Audit and thereupon the Treasurer of the District of Columbia was bound to pay the amount so certified to be due to the

person mentioned in the certificate of the Board of Audit as entitled thereto.

4. That when the Auditor of the Board of Public Works issued a certificate to a contractor, and the contractor endorsed and delivered the same to a third party, it became a marketable commodity in the usual course of trade.

5. That when a certificate was so endorsed and presented to the Board of Audit, that board treated the person so presenting it and claiming it to be his own, as the owner thereof and issued their certificate to him.

6. That these facts were well known in the community of the District of Columbia and were acted on by the citizens thereof, and that they were known and acted upon in like manner and the certificates bought and sold by dealers in the large cities of the United States.

7. That the said certificates so endorsed passed from hand to hand without further endorsement.

8. The evidence in the respective cases shows that the defendants purchased the certificate in question in the regular course of trade, bona fide, without notice of any prior equities, except as to the state of accounts between the district and the contractors, and that they paid the full market value therefor.

The bills set up that the certificates were only hypothecated by the respective complainants, who borrowed money on them, and they were endorsed and delivered by them to parties named as defendants in the said bills who never appeared or answered, and who put them into circulation in bad faith before the loans became due, and complainants offered to redeem and to pay or deduct from the amount realized by the defendants respectively the sums so advanced, with interest, and the court so decreed. See No. 102, p. 40; No. 1,075 and 1,076, p. —.

## ASSIGNMENT OF ERROR.

will

The defendants' ~~bill~~ maintain that the court erred in that decree which, in substance, put the defendants respectively in the shoes of the original lender of the money.

## POINTS.

I. We will endeavor to satisfy the court that in equity the endorsement and delivery of those certificates on the face of the papers was a valid assignment of all the interest of the assignor, and that interest was subject only to the state of accounts existing between the party to whom the certificate was given and the District of Columbia.

II. That where there are two innocent parties, and one of them must suffer loss, he whose negligence or default caused the loss must bear the loss.

Before proceeding to the discussion of these questions, we ask the attention of the court to Cowdrey's case, No. 1,075.

The court will find there the contract between Mandrel and J. V. W. Vandenburgh & Co., in these words and figures:

> "Six months from date, I will deliver to J. V. W. Vandenburgh & Co. $12,491.60, twelve thousand four hundred and ninety-one $\frac{60}{100}$ dollars, *in Auditor's Certificates of the District of Columbia*, against the payment of $5,000, five thousand dollars, in U. S. currency, paid into my hands.
>
> "WASHINGTON, *January* 27, 1874.
>
> "M. MANDEL."

| | |
|---|---|
| "No. 390 | $4,956 80 |
| " 300 | 1,534 80 |
| " 4,351 | 6,000 00 |
| | $12,490 60." |

It seems to us that Mandel's obligation would have been satisfied if he had delivered that amount in Auditor's Certificates of the District of Columbia, at the time specified, and on the payment of the money, and that he was not bound to furnish them any particular certificates. If so, there was a sale of the certificates enumerated at foot, which embraces those bought by Cowdrey, and not a pledge, and if that be so, it is an end of this case.

But to recur to our first point—

1. These certificates were *choses in action.* They were assignable at law and in equity; with this difference, that at law, except under authority of statute, the assignee could not sue in his own name; and in equity, specific performance could be decreed at the suit of the assignee. These are familiar principles. Both at law and in equity the assignee took, subject to the state of accounts between the original parties, and all other equities of which he had notice. The effort here is to make him subject to equities between the assignor and third parties, of which he had no notice.

In *Baldwin* vs. *Ely*, 9 How'd, 599, 600, Ch. J. TANEY delivering the opinion of the court in a case where the complainant, being the holder and owner of certain Mexican certificates, as they were called, which, he alleged, had been lost or stolen after he had endorsed them, and had come to the hands of the defendant, and which were, under the law, made payable to executors, administrators and assigns, says, arguendo:

> "The certificates in question were endorsed in blank by the appellant, and that endorsement would be useless and unnecessary, unless made for the purpose of transferring the property to an assignee, and authorizing any person, entitled to it in that character, to write over his name a formal and regular assignment, if that should become necessary."

That was precisely what was done in Cowdrey's cases. Does it make any difference that in one case the paper was assignable at common law, and in the other under a statute?

Certainly not, except that, at common law, he could not sue in his own name, and under that statute he might.

In the case of *Talty* vs. *Freedman S. & T. Co.*, 93 U. S., 326, which was an action of replevin, to recover one of these certificates, which had been delivered by payee, with his endorsement, to his broker to deposit as collateral for a sum of money, and the broker, claiming the right under some parol authority from the plaintiff, sold it to the bank. Mr. Justice SWAYNE says:

> "There is another question arising on the record, and that is whether the defendant in error, being a *bona fide* purchaser, did not, under the circumstances, acquire the ownership of the claim."

And he cites numerous authorities in support of that question, but no decision was made by the court of that question, as the case went off on another ground.

In *Chesley* vs. *Taylor*, 3 Gill, 251, the court permitted the holder of a single bill, a sealed note, a chose in action, endorsed by the payee, to write over the endorsement an assignment to himself, that he might maintain an action on it, brought in his own name under the act of 1829, chap. 51. And in *Cox* vs. *Sprigg & Wife*, 6 Mary'd, 274, the Court of Appeals decided that the right to bring the action in his own name is the only change made in the common law by that statute.

But we are in Equity. There it cannot be doubted that the assignee of a chose in action may enforce specific performance of an agreement or covenant, and receive the money to his own use. *Bentley* vs. *McKim*, 7 H. & I., 501.

The question then arises, whether anything more is necessary to complete an assignment of a chose in action than for the owner to endorse and deliver it.

As between the parties to the assignment, they would, of course, be bound by the intent with which such endorsement and delivery were made. But, how could that affect a subsequent *bona fide* purchaser, for value, without notice?

And in these cases, No. 102, where the Board of Public Works was made a party, and in Cowdrey's case, where the District of Columbia was made a party, the complainants seem to have understood this to be the law. If these endorsements were of no value, and conferred no rights, the complainants have not sustained any injury by the payments to the defendants. They have been paid without any authority, and the District is still responsible to them for the debts. It is, as to the defendants, a thing that is passed, and no longer in action. Yet they have dismissed their bills as to these parties. The debtor assented to the assignments, and paid the debts. The complainants, by dismissing their bills against the debtors, have, in the most formal manner, admitted that the debts have been paid to parties authorized to receive the payment. These parties cannot be made forced trustees, because the parties claiming to be *cestui que trust*, have no privity at law or in equity with them, and after this assent, they are estopped at law and in equity from settling up any trust which can bind the conscience of a *bona fide* purchaser.

It seems to be admitted by the respective bills, that an assignment might have been made which would have bound them. They claim that this endorsement was not such an assignment. Would a power of attorney have been more effectual, whether endorsed upon or annexed to the certificate? The case of *McNeil* vs. *Tenth Nat. Bank of New York*, 46 New York, 325, seems to be conclusive of that question, while the cases referred to by Mr. Justice Swayne, cited above, give that case full support. The endorsement was vain and idle, unless put on for some purpose—it was either to deceive or to give power. If the former, a court of equity will not listen to any attempt to impeach it. If the latter, a court of equity will enforce it.

We say it gave to the persons to whom it was delivered, thus endorsed, power "to write over their names a formal and regular assignment of it, if that should become necessary." In the Ballard Pavement cases, this was not necessary, for the money was paid, or the bonds given in payment without it, and in Corwdrey's cases it was done in the most formal manner, and the bonds paid to him.

### SECOND.

But if we are mistaken in this, then we say the defendants were innocent *bona fide* purchasers for full value, and were led into their purchases by the *indicia* of title exhibited by the endorsement of the complainants, the fact that they had a marketable value and passed by delivery on sale, and the possession of third parties of the paper having this *indicia* of title; and this by reason of complainants' culpable negligence.

1. We think it is established beyond reasonable doubt that these certificates, thus endorsed, were marketable commodities, and passed by delivery in open market.

We further insist that this was known to the complainants, and that they knew when they were endorsed and parted with by the complainants (See Ballard & Ridlow's evidence), that they would be recognized by the accounting officers as the property of the persons presenting them for adjustment, settlement, and payment.

They, therefore, knew that they were giving credit to them if they should be parted with by those to whom they had been hypothecated with their endorsement, which was the *indicia* of title.

It was, therefore, their duty to have accompanied their endorsement with some words of warning or restriction, which would have been notice to everybody to whom they were presented—such as "collateral," "hypothecated," or some words to show that there was some restraint on the power of sale which the payee's indorsement imported, and upon the absolute disposal thereof.

They could not transfer property with this *indicia* of title, and yet hold a secret trust upon it, like a "pocket deed." We hold this principle to be too clearly fixed at this day to admit of discussion now. On this point, and also in support of our first point, we refer to the case of *Taylor* vs. *Gett*, 10 Barr, 431. The case is sufficiently stated in the opinion of the court: "We think, too, the court was wrong in the answers to the several points upon which instruction was prayed. *These answers proposed* to visit the Taylors [who were the purchasers of a bill single, a sealed note] with the supposed fraud committed by Pelouse against Dan'l Gett without any notice of it traced to the former." [Gett was the payee in the chose in action, and had assigned it to Pelouse, and Pelouse had, in violation of his contract with Gett and without his authority, transferred it to the plaintiffs.] "They were based upon the rule established by *Wheeler* vs. *Hughes*, 1 D., 23, that the assignee of a bond, whether legal or equitable, takes it subject to all the equities which subsisted between the original parties, or between the obligor and an intermediate assignee (*Metzger* vs. *Metzger*, 1 R., 227) when he neglected to make the proper enquiry. The propriety of this rule has been questioned more than once, since it is in direct contradiction of the rule, both at law and in chancery, that a purchaser for a valuable consideration is not to be affected by a latent equity of which he had no notice, or the knowledge of which might not have been picked up in the road of his direct enquiry had he pursued it." * * But where there is no dispute on this head (that is, the amount due), where, as here, the *obligor* makes no defense and pays the money, there is no room for the operation of the principle deduced from the statute. The case is left to be governed by the ordinary rule of protection of a *bona fide* purchaser already stated. It would, indeed, be highly unjust if it were not so. Take the present case as an illustration. David Gett, the obligee, endorsed on the bill single, his transfer of it to Pelouse, purporting to be for value. Pelouse, in the course of trade, offers it to Taylor & Co., who learn from the *obligors* that they had no defense to make against it. Taylor & Co. accept an assignment of it from Pelouse, to whom they pay value. *Shall the man who first gave it currency be permitted to set up the fraud of the first assignee*, which *his* act enabled him to commit against an innocent holder without notice? In this respect it comes directly within the axiom that when one of two innocent parties must suffer, he who gave occasion of the loss shall bear it. (*McMullen* vs. *Wenner*, 16 S. & R., 21.) It will not do to say the *last assignee should have enquired of the obligee whether any difficulties existed before accepting the bill. This has never been held incumbent on the purchaser of a bond*, simply because it is not to be supposed any information could be derived from one who appears to have parted with his whole interest in the thing."

To the same effect is *McNeil* vs. *The 10th National Bank, New York*, 46 New York, 325; in which the whole of these two points are discussed at great length. That case differs from this now in hand, in this particular only, that the owner of the securities, deposited as collateral, gave with them a *blank power of attorney* to sell and transfer them, which was filled up by the broker when he sold the securities and sold them in violation of his pledge.

We say the indorsement on the certificates in these cases and the delivery with the naked indorsement were equivolent, with a blank power of attorney.

Law

We refer to the whole opinion in this case, as showing the state of the case at the time of that adjudication.

In *Row* vs. *Dawson*, 1 Vez. Sen'r, 331; Lord HARDWICKE says, speaking of the subject-matter in controversy: "It is an agreement for valuable consideration beforehand, to lend money, on the faith of being satisfied, out of this fund, which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund *and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a chose in action this court does, and any words will do, no particular words being necessary thereto.*" * * This draft, which amounts to an assigment, *is deposited with the officer Swinburn, and therefore it attached immediately upon it*, so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt; *because he would have paid it with full notice of this assignment for valuable consideration.*"

This was while the case of *Ryall* vs. *Rowles*, was under consideration by Lord HARDWICKE, assisted by the judges and argued by two counsel on each side, and reported in 1 Vez. ~~Jun'r~~, 367, and 1 Atk., 165, under the name of *Ryall* vs. *Rolls*. In that case Lord HARDWICK says: "But I will first consider the case of an assignment of a mere chose in action. The simplest case I know of is of a debt on bond, which is only assignable in equity, not at law. The reason why assignable in equity, is because the assignor can furnish the assignee with all the means to reduce it into possession, giving authority to sue in his name, and the bonds into his hands to prove his debts, when he does sue. Why is not delivery, then, as requisite on such an assignment as a delivery in the conveyance of a thing in possession? Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself. A bond debt is certainly a chattel."

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Lord Chief Baron PARKER (one of the assisting judges) says as to this matter: "On the third question it is objected for the defendant that this clause [a clause in the bankrupt act] extends not to things in action; * * but *goods and chattels include debts*, and things in action are considered as goods and chattels." (Story, 188; Slade case, 4 Coke, 95.) * * "But it is said there can be only an equitable assignment of a chose in action, which is true; and yet in the case of bonds assigned (for bills of exchange or promissory notes are assignable at law) *they must be delivered, and such delivery of the bond or notice of the assignment will be equivalent* to the delivery of the goods." Chief Justice **Lee** says: "This act [the bankrupt act] supposing the conveyance to be on good consideration, and the party to be an honest creditor or mortgagee, but not to have any preference to other creditors, because he does not give notice to other creditors by *having that delivery to him to which he was entitled.* * * The enquiry on the second point is whether choses in action are not included in *goods and chattels.* * * Choses in action will be included therein." (Fullwood's case, 4 to 65.)

And Lord Chief Baron **Parker**: "That on the assignment of a bond debt the bond should be delivered and notice given to the debtor. And with respect to simple contract debts for which no securities are holden—such as book debt, for instance—notice of the assignment should be given to the debtor, in order to take away from the power and disposition over the thing assigned. 1 Vez., Sen'r, 367; 1 Atk., 177.

The mere delivery of a written evidence of debt, with intent to transfer the debt itself, is sufficient to constitute an assignment, whether it was conditional or not. *Ryall* vs. *Rowles*.

No notice was necessary in these cases, and the money has been paid to the assignees. The same principle has been settled in the cases of *Dearle* vs. *Hall*, 3 Russ., 1, and *Loveridge* vs. *Cooper*, 3 Russ., 30, which were questions of priority as between two assignees, the junior assignee giving given the first notice. In the cases in hand the evidence is clear of good faith and diligence on the part of the defendants. In the first case the Master of the Rolls, Sir THOS. PLUMMER, says: "What title have they shown to call on a court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their own negligence, a negligence not accounted for, in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is the plaintiff to be heard in a court of equity who asks its interposition in his behalf to indemnify him against the effects of his own negligence, at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the person who seeks relief against him? The question is not, as in *Evans* vs. *Bricknell*, whether a court is to deprive the plaintiffs of any right—whether to take from them, for instance, a legal estate or to impose any charge on them. It is simply whether they are entitled to any relief against their own negligence."

And so in the same case the Master of the Rolls says:

> "What opportunities for fraud would be afforded if a party having obtained an equitable conveyance conceals it from every body, and lies by for years while intermediate transactions are taking place, could at any time come forward with his secret deed and say to a subsequent purchaser, who had advanced his money in ignorance of such claim, 'my deed is prior to yours, and, therefore, whatever may have been my negligence or your diligence the property belongs to me.' Good sense, reason, authority, and equity are all on the other side."

And see, also, Powell on Mort., by Coventry, p. 451, vol. .

The principles contended for by us are—

Whenever, the holder of a written chose in action puts his name on it and delivers it to a third party, without any restriction, or limitation on the power and dominion over it by the party to whom it is delivered, accompanying, or upon the paper itself, it imports an absolute sale and transfer, and if his assignee assigns and delivers it to a third party for value without notice, the original holder cannot set up equities between himself and his assignee, to defeat the right of such purchaser. 3 Gill, above.

And, Second. That if he shall sustain loss by his negligence or other failure to accompany his indorsement with some act which shall subject a purchaser to take notice or put him on inquiry as to the right of an assignee to transfer it, "good sense, reason authority and equity" concur in saying that he, himself, must sustain that loss.

The same principles prevail in sales of real estate and it would be difficult to find a rule governing a court of equity affecting a course of dealing (except indeed the rule *caveat emptor*) which would not apply equally to personal and real estate.

In the case of *Bayley* vs. *Greenleaf*, 7 Wheat., 46, Ch. J. MARSHALL, delivering the opinion of the court as to the question of the vendor's lien on the sale of real estate, says: "But whether the lien of the vendor be established as a natural equity or from analogy to the principle that in a bargain and sale the bargainor stands seized in trust, unless the money is paid. *Still it is a secret invisible trust known only to those to whom it may be communicated; in fact to the world the vendee appears to hold the estate divested of any trust whatever, and credit is given to him in the confidence that the property is his in equity, as well as at law. A vendor relying on his lien ought to reduce it to a mortgage so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem incon-*

*sistent with the principles of equity and with the ~~grand point~~ General Spirit of our laws that such a lien should be set up in the court of chancery to the exclusion of creditors.*" A *multo-fortiori*, we say, to the exclusion of *bona fide* purchasers for full value, in open market without notice.

And so in the case of *Moore et al.* vs. *Holcombe et al.*, 3 Leigh, 597. In that case, Holcombe had sold land to Moore and received a part of the purchase-money; but had no security for the residue. Moore sold the land to Franklin, took his bonds for the purchase-money, and assigned those bonds to Murrell and Meem, for value, and without notice of the vendor's lien claimed by Holcombe. They gave notice to Franklin of the assignment to them, and filed their bill to restain him from paying and Moore from collecting those bonds, and to have the unpaid portion of the original purchase-money due to Holcombe paid out of those bonds.

Carr, J. (602), says: "The bonds were taken subject to all the equity of the obligor, but they were not taken *subject to the latent equity of a third person.*"

Cabell, J., p. 603: "The lien is in itself secret and invisible. *The vendor had it in his power to make it otherwise, by reserving a lien expressed in his deed to the vendee:* or by taking a lien from his vendee in some other form, so as to be notice to all the world. If he omit to do this, if he convey the land to the vendee in such a manner as to make him appear the complete owner, with full power to sell or change it, justice forbids that he should use his secret lien to the injury of those who in ignorance of it (an ignorance produced by his own omission) have acquired, for valuable consideration, either the legal title or an equitable incumbrance. * * * What is the principle of justice that exempts from the lien of the vendor a subsequent purchaser? *It is that he has made his contract and paid his money without notice.* The acquisition of the legal title does not add to the justice of this claim the weight of a feather. In justice, then, the equitable incumbrances stands on the same ground with the purchaser of the legal title, for he also has made his contract and paid his money without notice of the secret lien of the vendor."

TUCKER, P. J., pp. 606, 607: "Try this case by these principles, was anything due from Franklin to Moore (when he received notice of Hancock's claim) which equity demanded that he should pay over to Hancock instead of Moore? Nothing was due. His bonds, indeed, had been due to Moore, but Moore had sold them, for value, to persons who knew nothing of the vendor's pretensions. From the moment of that sale, Franklin ceased to owe Moore anything. He became the debtor of the other assignees, and as he owed Moore nothing, he could be liable to Hancock for nothing, as has been already shown." (Hancock had attached Moore's interest.)

"It is true that assignees take every bond, subject to the *obligor's* equity against the obligee, but I have yet to learn that they take subject to an unknown equity of a stranger against the obligee."

Many cases of this kind might be produced to show that where there was a secret trust binding the subject-matter covered by the sale and delivery, and it was not disclosed or knowledge of it brought home to the purchaser, he takes it discharged of the trust.

But it is sought to extricate these causes from these well-settled principles of legal and equitable jurisprudence on the grounds of commercial law.

In the first place, these certificates were not and could not be brought within the commercial law governing bills of exchange, and they were not negotiable paper.

They were simply choses in action which, under the then existing state of things, became a marketable commodity after they were endorsed by the original creditor, and were sold and delivered in the usual course of the trade in them as marketable commodities.

In *Pickering* vs. *Burke*, 15 East., 43, Lord ELLENBOROUGH says: "Strangers can only look to the acts of the parties, and to the *indicia* of property, and not to private communications which may pass between the principal and his broker; and if a person authorizes another to assume the apparent right of disposing of the property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." And so we may say here, there is no commercial law in these cases separate and distinct from the great principles of equity jurisprudence as to good faith, notice, giving value, in actions and transactions in the usual course of trade, which can take them out of the control of those principles.

We are here met by a series of decisions in the State of New York which seem to bear on the rule stated by Lord THURLOW in *Davies* vs. *Austin*, 1 Ves. Senr., 247: "A purchaser of a *chose in action* must always abide by the case of the person from whom he buys." While we do not concede this to be the true rule, and find, from many adjudicated cases, that it does not apply to latent equities of which the purchaser had not and could reasonably have had notice, as stated in the case in 10th Barr, we do not deem it necessary, in this case, to do more than bring ourselves within the admitted exceptions to the rule stated in 22 New York, 538, 539. This is the leading case in that State, and it is a little remarkable that no case outside of that State is relied on or even cited in support of the principle on which it proceeds, except the one cited from 1 Vez. Sen. But in that case, 22 N. Y., 538, the court says: "The cases in which, from motives of policy, to *promote the currency of certain securities, to prevent fraud, and to aid the vigilant against the careless*, the party to whom the transfer is made

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is allowed to claim a greater interest than was possessed by the others, are *exceptional*; and it is for the party claiming the protection of an exception to show that it exists in a particular case."

And this court, in the cases of *Baldwin* vs. *Ely*, already cited, and of *Murray* vs. *Lardner*, 2 Wall., 110, has adjudicated the same rule. In the first case, the matter was in relation to "Mexican certificates," which were not negotiable commercial paper, subject to the law merchant, and in the other was United States Coupon Bonds; both of which were marketable commodities, and to them the court applied the same rules as controlled in cases of latent equities or secret legal titles.

We propose to take these cases out of the category of the New York decision, if that shall be approved by this court and to show that they are emphatically "within the exception."

We have collected and collated the pleadings and the proofs to show that the certificates, like those in question, probably from the time of the first issue were thrown upon the market after being endorsed and delivered, and were sold and delivered "as any other security;" and had a market value; and the persons to whose possession they came were by the proper authority, to whom they were presented, recognized as the true owners, and the money paid to them after the certificates had been examined and approved; these facts are brought home to the knowledge of the complainants, and the money actually realized by the defendants, without any notice of a claim on the part of complaints; and we respectfully submit that these facts bring us within the exception admitted in the rule sought to be established in the State of New York.

The authority of *Bush* vs. *Lathrop*, was shaken, if not overruled, by the case of *McNeil* vs. *The Tenth Nat. Bank*, 46 New York; and the last shred of it was disposed of and the case overruled in *Moore* vs. *Metropolitan Nat. Bank*, 55 New York, 41.

This last case, which we have just seen for the first time, and after ~~one~~ our brief had been completed, seems to cover the ~~case~~ Cases before the court, and we leave them with confidence that the opinion in that case fully sustains the grounds of our appeal.

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